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THE INTERNATIONAL LEGAL EFFECTS OF UNILATERAL DECLARATIONS

By Alfred P. Rubin *

I

INTRODUCTION

The International Court of Justice is the principal judicial organ of the United Nations and its judgments are usually considered highly persuasive as to propositions of international law.¹ Thus, when the ICJ formulates a rule of international law giving binding force to a unilateral declaration of a state's future intentions, statesmen may be expected to refer to that formulation for guidance whenever they consider the possibility of issuing a declaration of future policy. Moreover, the ability of the ICJ to support its formulation of a rule of international law in terms of the international legal order and legal logic affects the perceptions of statesmen as to the probity of the Court, as well as the willingness of states to refer real cases to it. The Judgment of the ICJ in the *Nuclear Tests* cases² raised both these issues in a particularly pointed way.

In its Judgment³ in the *Nuclear Test* cases, the ICJ said:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the

* Of the Fletcher School of Law and Diplomacy.

¹ UN Charter, Art. 92. As to the persuasiveness of ICJ judgments, see Fitzmaurice, *Judicial Innovation—Its Uses and Its Perils . . .*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW 24 (1965); C. PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 91-94 (1965).

² *Nuclear Tests (Australia v. France)*, [1974] ICJ REP. 253 and *Nuclear Tests (New Zealand v. France)*, *id.* 457.

³ Of the nine Judges subscribing to the Judgment, three in separate opinions expressly withheld their concurrences from the rationale stated in the Judgment (Forster, Gros, and Petré). A fourth concurring Judge in his Separate Opinion (Ignacio-Pinto), reaching the same conclusion as the Judgment but by other logic, affirmed that he found the Judgment "just and well founded" (*id.* 311). Of the six dissenting Judges, four in a Joint Dissenting Opinion (Onyeama, Dillard, Jiménez de Aréchaga, and Waldock) and one in an individual Dissenting Opinion (Barwick) found fault with the Judgment on so many other points that their failure to express themselves on this point can hardly be interpreted as indicating a concurrence; they all referred to their unwillingness to take a position on the ground that the point was not argued before the Court. (*Id.*, Joint Dissenting Opinion paras. 14, 23-25 (*Australia v. France*), 13, 22-24 (*New Zealand v. France*); Barwick Dissenting Opinions 392, 448 (*Australia v. France*), 528 (*New Zealand v. France*).) Another dissenting Judge (De Castro) assumed the validity of the asserted rule *arguendo* and proposed a new formulation of it fundamentally inconsistent with the formulation of the Judgment. (*Id.* 374.) Thus the particular paragraphs quoted above actually were concurred in by only six Judges while five of the other nine disagreed and four pointedly withheld their views.

declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

The only clue given in the Judgment of the Court as to the legal basis for this assertion regarding the effect in international law of unilateral declarations given publicly and with an intent to be bound is a reference to the basic principle of good faith:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.⁴

This paragraph seems to presume that an "international obligation" may be assumed by way of a unilateral declaration independently of the principle of good faith, as the rule *pacta sunt servanda* assumes that the "pactum" exists before it is concluded that it must be obeyed. The Court apparently took the view that good faith merely prevents unilateral revocation of the international obligation, created by the unilateral declaration.

The Court applied the asserted rule to a series of unilateral declarations by France concerning the French intention to abstain from future atmospheric nuclear tests in the South Pacific area, holding that the Australian application, asking the Court to adjudge that "the carrying out of further atmospheric nuclear weapons tests in the South Pacific Ocean is not consistent with applicable rules of international law," and the New Zealand application asking the Court to adjudge "[t]hat the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fallout constitutes a violation of New Zealand's rights under international law," each presented a "claim . . . [that] no longer has any object . . ."⁵

This article will examine the asserted rule in some detail as a statement of a purported norm of general international law and as applied to the

⁴ *Id.*, paras. 43 & 46 (Australia v. France), paras. 46 & 49 (New Zealand v. France).

⁵ The Court's recital of the Australian and French applications and the quoted *dispositif* are at *id.* paras. 11 and 62 (Australia v. France) and 11 and 65 (New Zealand v. France).

facts in the *Nuclear Tests* cases, and will conclude by pointing out some implications of its handling of these cases for the future of the Court.

II

UNILATERAL DECLARATIONS IN GENERAL INTERNATIONAL LAW

A. State Practice

Prior to the French declarations addressed by the Judgment of the ICJ in the *Nuclear Tests* cases, there was only one clearly analogous unilateral declaration of intention which was the subject of international correspondence and scholarly attention—the Egyptian declaration of April 24, 1957 regarding the continued operation of the Suez Canal. However, other incidents have been mentioned as pertinent by various learned commentators, and it is useful to review briefly the most common situations involving more distant analogies for giving legal effect to unilateral declarations. Those other situations will be reviewed first because most of them occurred before 1957 and an understanding of them will clarify the views of states expressed at the time of the Egyptian declaration.

There appears to be general agreement that a declaration made before an international tribunal by a party is binding on that party.⁶ But such declarations can hardly be classed as “unilateral” in the sense of the *Nuclear Tests* cases. Such declarations are made in a context of multilateral formality and the integrity of the tribunal is involved directly. In the *Nuclear Tests* cases mere publicity and intent to be bound are stated to be sufficient to give rise to the legal obligation. The “strictly unilateral nature of the juridical act” in the *Nuclear Tests* cases is not an accurate description of a statement made to a tribunal.

Unilateral declarations affirming a preexisting obligation have occasionally been given weight. An example of such declarations would be Hitler's pronouncements before the German Reichstag promising to respect the territorial integrity of Austria and Czechoslovakia; those declara-

⁶ The Permanent Court of International Justice has held that declarations of intention made before the court are binding. See *German Interests in Polish Upper Silesia Case (Merits)*, [1926] PCIJ ser. A, No. 7, at 13. In *The Mavrommatis Palestine Concessions Case (Merits)*, [1925] PCIJ ser. A, No. 5, at 37, the Court referred to a declaration made by “The British Government, through its Representative” before the Court: “. . . That explicit declaration I, as such authorized representative of H.M. Government, and a member of it, here repeat that we intend to carry out whatever obligations, if any, the Court says are imposed upon us by the terms of the Lausanne Protocol.” The Court said: “After this statement, the binding character of which is beyond question . . .” Cf. also the Court's conclusion that despite some doubts of the authority of a Swiss representative to bind his government to an offer made to France during court proceedings, “[H]aving regard to the circumstances in which this declaration was made, the Court must however regard it as binding on Switzerland.” *Free Zones of Upper Savoy and the District of Gex*, [1932] PCIJ ser. A/B, No. 46. However, the Mavrommatis declaration seems to have been merely a reiteration of British obligations under other instruments and the Free Zones declaration was analyzed by Lord McNair and the International Law Commission in such a way as to cast doubt on the declaration as a source of the Court's view of the law.

tions were cited in the Indictment of the Major War Criminals at Nuremberg in 1946.⁷ But the Indictment does not seem to draw any direct legal inferences from those pronouncements, and in its Judgment the International Military Tribunal cites them only as German acknowledgments of its treaty and general international legal obligations not to resort to war against Austria or Czechoslovakia, or as policy statements later given weight in international law by being translated into treaty commitments.⁸ Another example occasionally cited as evidence of the legal effect of a unilateral declaration involves the South African declaration of April 9, 1946 in the Assembly of the League of Nations and equivalent communications of October 14, and November 4, 1946 and July 23, 1947 to the United Nations Secretary-General and the Fourth Committee of the UN General Assembly affirming South Africa's responsibilities under the League of Nations arrangements for South-West Africa (Namibia). But in considering the legal weight to be given to those communications, the ICJ concluded that: "These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government."⁹ Indeed, it would seem that to the extent the South African declarations are considered analogous to the French declarations of the *Nuclear Tests* cases, the language and reasoning of the ICJ in the earlier case indicates that the Court then thought a "mere indication of . . . future conduct" by a government, even given formally before the Fourth Committee of the General Assembly of the United Nations or to the United Nations as a whole through its Secretary-General, did not create any legal obligation.

Ostensibly "unilateral" declarations have been considered binding when made in the context of a larger negotiating situation. The classical *Eastern Greenland* case¹⁰ turned in part around an oral declaration, later reduced to writing and initialed by M. Ihlen, the Norwegian Minister of Foreign Affairs, advising the Danish Minister of Foreign Affairs that "the plans of the Royal Danish Government respecting Danish sovereignty over the whole of Greenland . . . would meet with no difficulty on the part of Norway." The Permanent Court of International Justice (PCIJ) held the statement to be binding on Norway with the legal effect of rendering later steps by Norway to occupy parts of Greenland "unlawful and invalid." But the reasoning of the Court was based squarely on the negotiating context in which the statement of M. Ihlen was made; that it was a "response to a request by the diplomatic representative of a foreign Power."¹¹ In the *Nuclear Tests* cases, the assurances sought by Australia and New Zealand were refused by France, and the declarations were deliberately kept out of the negotiating context. The treatment of the Ihlen declaration by

⁷ 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 27 at 36, 38 (1947).

⁸ *Id.* 171 at 192.

⁹ International Status of South-West Africa, Advisory Opinion, [1950] ICJ REP. 128 at 135.

¹⁰ Legal Status of Eastern Greenland, [1933] PCIJ ser. A/B, No. 53.

¹¹ *Id.* 53.

the PCIJ cannot be viewed as a precedent for the rule of law expressed by the ICJ in the *Nuclear Tests* cases in holding that the declarations were binding "even though not made within the context of international negotiations."

Similarly, the declarations of neutrality made by Austria on October 25, 1955 and by Laos on July 9, 1962, were not regarded as significant international documents standing alone. Both declarations were formally incorporated in multilateral undertakings, and it seems to be the dominant view of states that they derive whatever legal force they have in the international arena from those other undertakings.¹²

Some unilateral acts, like acts of "recognition" or a conditional declaration of "acceptance" as part of the formation of a treaty, have legal effects but do not of themselves create legal obligations in the sense of the Judgment in the *Nuclear Tests* cases. The peculiar place of recognition in the international legal order is itself a most complex subject and not easily conceived as a useful model for a law of unilateral declarations. Recognition is normally conceived to bear some relationship to a perceived state of facts and does not involve an expression of intention to which the "recognizing" state can be said to be bound.¹³ Conditional declarations, which depend for their further legal effect on some action or declaration in return, do not create present obligations any more than an offer to contract in municipal law creates a present legal obligation to carry out the conditional promise. Furthermore, the normal rule that an offer can be withdrawn at any time prior to its being accepted¹⁴ places offers in a class wholly different from the class of unilateral declarations discussed in the Judgment of the ICJ in the *Nuclear Tests* cases; in those cases, as noted above, the Court concluded that the principle of good faith forbade unilateral revocation of the obligation the Court believed was created by the unilateral declarations of France. Therefore, unilateral declarations envisaging counteraction or response as a condition of their becoming binding are not analogous to the unilateral declarations referred to by the ICJ in the *Nuclear Tests* cases. Indeed, the language of the Court is clear on the point, excluding from consideration declarations for which "subsequent acceptance . . . [or] reply or reaction from other States, is required for the declaration to take effect. . . ."

¹² The United States specifically rejected the view that the Austrian declaration had independent legal force. The relevant documents are analyzed in 1 WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 348-55 (1963) and 3 *id.* 462-77 (1964). The Laotian declaration was apparently regarded as a mere internal document of Laos until it was "recognized" formally and coupled with express reciprocal undertakings by the thirteen other countries involved in Laotian affairs on July 23, 1962. See 1 *id.* 355-57.

¹³ For the legal implications of the distinction between an assertion of fact or law and an assertion of future intention, see the discussion of estoppel *infra* p. 16.

¹⁴ Or, in some cases, until the offeree has begun the sought-for performance or otherwise foreseeably relied to his legal detriment on the reasonable expectation that the offer would remain open; but this is not the place to discuss the technicalities of the international law of treaty formation or the municipal law of contract formation. Some theoretical aspects of the matter will be discussed below.

Claims by a second party to the benefits of a unilateral declaration bear some analogy to claims by a third party to benefits conferred in a treaty negotiated by others. This analogy will be dealt with in Section II.B.8 below.

All of the situations and cases reviewed above occurred before the Suez crisis of 1956-57, except the Laotian neutrality declaration, which is, as has been seen, not significant for present purposes. In 1956 the only state practice or case indicative of the law regarding unilateral declarations in the sense of the *Nuclear Tests* cases was the Advisory Opinion of the ICJ concerning the *International Status of South-West Africa*, which implied that unilateral declarations of intention did *not* of themselves create legal obligations.

On July 26, 1956 the Government of Egypt nationalized the Universal Suez Maritime Canal Company, precipitating a major international reaction.¹⁵ On April 24, 1957, the Government of Egypt issued a unilateral declaration:

In elaboration of the principles set forth in their memorandum dated 18 March 1957, the Government of the Republic of Egypt, in accord with the Constantinople Convention of 1888 and the Charter of the United Nations, make hereby the following Declaration on the Suez Canal and the arrangements for its operation.

[There follow nine paragraphs of detailed Egyptian intentions with regard to the future operation of the Suez Canal and procedures for settling disputes] . . .

10. . . . This Declaration, with the obligations therein, constitutes an international instrument and will be deposited and registered with the Secretariat of the United Nations.¹⁶

In so far as it could be interpreted to be an offer to enter into a treaty, this declaration was specifically rejected by the Suez Canal Users Association,¹⁷ the body which appears to come as close as any to an offeree in the traditional contract sense. It is possible to construe the Egyptian declaration as a true unilateral declaration, therefore, confronting the international community with the need to determine its legal efficacy in practice.

In fact, the international community was divided on the effects of the Egyptian declaration. While the Suez Canal Users Association continued to deny its validity, Egypt and its friends supported it. The declaration was printed in the United Nations Treaty Series. There is some legal question whether the Secretary-General had the authority under the Charter *not* to register and publish the document as a treaty on the request of

¹⁵ See 3 WHITEMAN, *supra* note 12, at 1076-1130. The nationalization decree is reproduced in translation at 1097-99.

¹⁶ See annex to Egyptian letter addressed to the Secretary-General of the United Nations, UN Docs. A/3576, S/3818 April 24, 1957. The Egyptian Declaration is registered with the United Nations Secretariat as if it were an "international agreement" under Article 102 of the UN Charter and has been reproduced as if a treaty in 265 UNTS 299. See also 3 WHITEMAN, *supra* note 12, at 1123-26.

¹⁷ *Id.* 1126.

Egypt, so it is possible to argue that his action of registering and publishing the document under Article 102 is irrelevant to the question presented.¹⁸

The Suez Canal users in fact continued to use the Canal, and Egypt continued to administer the Canal according to the terms of the unilateral declaration, but the users claimed that their actions were not to be construed as an acceptance of the legal force of the Egyptian declaration. No instance is reported of any Canal user asserting rights against Egypt on the basis of the Egyptian declaration of 1957. And now it is too late for a later acquiescence to give retroactive legal validity to the Egyptian declaration. It would be a violation of the principle of good faith for any state that had publicly refused to grant legal effect to the Egyptian declaration now to change its position. If the Egyptian declaration was not made in a negotiating context and created no legal obligation on the part of Egypt, so the equivalent pronouncements of the states rejecting the Egyptian position and stating their intention to carry on on the basis of the 1888 Constantinople Convention must have equivalent weight. Thus were Egypt now to revoke its 1957 declaration and declare its return to the regime based on the validity of the 1888 Constantinople Convention, it would seem that no user would have grounds for complaint. If that is so, it is difficult to see the Egyptian declaration as a precedent for the rule propounded by the ICJ in its Judgment in the *Nuclear Tests* cases.

Another aspect of the Egyptian declaration of 1957 must be mentioned as pertinent to this discussion: France was among the states refusing to accept the proposition that a unilateral declaration was irrevocable. Two days after the Egyptian declaration was submitted to the UN Secretary-General on April 26, 1957, the French representative stated to the UN Security Council:

[U]ne déclaration unilatérale, même enregistrée, ne peut . . . avoir d'autre portée que celle d'un acte unilatéral, et nous devons tirer de cette constatation d'évidence la conséquence que, décrétée unilatéralement, la déclaration peut être modifiée ou annulée de la même façon.¹⁹

It may be concluded that the state practice prior to the Judgment in the *Nuclear Tests* cases reveals no consensus supporting a rule asserting an international obligation to be created by a unilateral declaration uttered publicly and with an intent to be bound, in the absence of additional factors such as a negotiating context, an affirmative reaction from other states, a tribunal to receive the declaration officially, or a supporting preexisting obligation. To the extent some states, such as Egypt, accepted such a rule, others, such as France, did not. To the extent any tribunal had focused on the issue, there had been an implied rejection of the asserted rule.

¹⁸ On the general topic, see GOODRICH, HAMBRO, AND SIMONS, *CHARTER OF THE UNITED NATIONS* 610-14, esp. 612-13 (3rd rev. ed. 1969).

¹⁹ 11 SCOR (776th mtg) para. 59 (1957). The quoted language is in the original French for precision. The official translation is as follows:

. . . [A] unilateral declaration, even if registered, cannot . . . be anything more than a unilateral act, and we must draw the conclusion from these findings that just as the Declaration was issued unilaterally, it can be amended or annulled in the same manner.

B. Doctrine

(1). *Basic Considerations*: Every legally significant act in a legal system that posits individual legal personality is, in a sense, unilateral. Thus, in most if not all legal systems that have a concept of contract, the contractual tie is created by the law giving legal value to various acts of the several parties to the transaction.²⁰ Even a final ceremonial signing by the parties to a new contract does not supersede the need for a "unilateral" prior act which the Anglo-American legal system labels an "offer," or the "unilateral" subsequent act which the Anglo-American legal system labels an "acceptance."²¹ It is the legal system which informs the parties and enforcement officials of the legal order which precise acts have which precise legal effects within the system.

Within the Anglo-American legal system, context is very important. A promise²² by an individual may be construed by the Anglo-American legal system as an "offer," the first step in a path that leads to a "contract" which the courts will enforce; or as an "acceptance," which may be the last step in that path; or as an advertisement or invitation to bargain which is not either an offer or an acceptance; or even as a crime, as when the promise is part of a conspiracy to commit an illegal act.

The first modern analyses of the juridical implications of unilateral acts in international law focused on the implications for positivist theory of acts that indicate the acceptance of a legal obligation.²³ Approached from this side, all state acts have a value as precedent, if not some more direct legal result: "Recognition" is a unilateral act with legal results that have been much discussed; a protest is a unilateral act the precedential value of which may be determined only after exhaustive analysis of the particular context in which the protest took place; a failure to protest may, in some circumstances, have juridical importance. Whether, in the particular circumstances, the unilateral act is viewed as "not made within the context of international negotiations" depends on whether the analyst perceives the interaction of states as a continuing period of negotiation. The ICJ in the *Nuclear Tests* cases obviously did not perceive "negotiation" to extend to the contexts of recognition, protest, or other acts not along the

²⁰ I SCHLESINGER, *FORMATION OF CONTRACTS* 77 (1968). Despite the limited number of legal systems dealt with by Schlesinger, most international lawyers today would agree that the legal systems studied by him and his colleagues embody the general principles of law deemed most persuasive by statesmen and analysts of public international law.

²¹ Cf. the Uniform Commercial Code (UCC), which has been adopted with some variations by each commercial law jurisdiction in the United States except Louisiana, sec. 2-204, which seems to envisage the formation of a contract without any specific "offer" and "acceptance," and secs. 2-206 and 2-207 which seem to presume that unilateral acts that can properly be labeled "offer" and "acceptance" will underlie any contract.

²² To avoid confusion, hereafter the word "declaration" or the phrase "declaration of intention" will be used, following the example of the ICJ, in discussion of the international law; the word "promise" will be used only when municipal law implications are intended.

²³ E.g., PFLUGER, *DIE EINSEITIGEN RECHTSGESCHÄFTE IM VÖLKERRECHT* (1936).

path of treaty formation. Thus, analyses that reflect a view of the international legal order as emphasizing sovereign equality and independence, as regarding all acts by states as essentially "unilateral" but part of a system of constant adjustment of rights and obligations in which legal significance is given to each of those acts, are simply inconsistent with the ICJ's basic approach. Those analyses are thus irrelevant to this study.²⁴ The ICJ's logic seems odd in positing a system in which states are *not* conceived as constantly negotiating with each other, but in which unilateral acts have legal results identical to the results they would have if states were constantly negotiating with each other. Those problems cannot wholly be avoided, but they can be minimized by confining the discussion to a more superficial level by avoiding the discussion of the theory that underlies the conception of the legal effects of "unilateral" acts that the Court seems to have had in mind.

(2). *Good Faith*: Only one publicist, Georg Schwarzenberger, has unequivocally asserted a rule supporting the binding character of unilateral declarations by derivation from international law's "fundamental principle" of "good faith."²⁵ But since no concept of "good faith" can make binding a policy declaration or other pronouncement that is *not* binding because not conceived as binding by any party concerned, to argue that "good faith" alone creates the obligation is to argue in support of an obvious absurdity. The precedents cited by Professor Schwarzenberger involve in one case recognition²⁶ and in another the simultaneous assertion of inconsistent legal positions.²⁷ In neither case is a unilateral declaration of intention in-

²⁴ E.g. Garner, *The International Binding Force of Unilateral Oral Declarations*, 27 AJIL 493 (1933). The two precedents Garner finds to support his approval of the PCIJ conclusion in the *Eastern Greenland* case involved positing a context of negotiations, as indeed did the Court's approach to the Ihlen declaration. In one, *Kulin v. Etat Roumain*, (7 REC. DES DÉCISIONS DES TRIBUNAUX ARBITRAUX MIXTES 138 (1927)), the issue involved conflicting assertions during negotiations between Romania and Hungary regarding the proper interpretation of the 1920 Treaty of Trianon (12 DE MARTENS, NOUVEAU REC. GÉN. (3rd ser.) 423), and the other involved the Lytton Commission of Inquiry report adopted by the League Assembly on February 24, 1933, and Japanese assertions regarding the legal weight to be given some Chinese statements made to Japan during inconclusive negotiations in 1905 (League of Nations Document C.663.M.320.1932.VII, Oct. 1, 1932, at 45-45). However, these instances involved promises made during the course of negotiations but not integrated into the document emerging as a final text from that negotiation. Their municipal law analogue is not to unilateral promises but to the "parole evidence rule." See *Mitchell v. Lath* 247 N.Y. 377, 160 N.E. 646 (1928).

²⁵ Schwarzenberger, *The Fundamental Principles of International Law*, 87 REC. DES COURS 190 at 312-14 (I, 1955).

²⁶ The British Government in 1837 refused a Persian request to recognize the dependency of Afghanistan on Persia, alleging instead that British recognition of an independent Afghanistan in 1809 precluded such an action. It would seem that the British action involved "good faith" in the sense of refusing to characterize a situation in a way the British felt the facts would not warrant. It is hard to see the relationship of the precedent to unilateral declarations in general. The correspondence is at 25 BFSP 1267.

²⁷ The United States Government in 1861-1865 simultaneously asserted a right under municipal law and a right under international law to close ports in the Confederate

volved. It is noteworthy that while the ICJ in the *Nuclear Tests* cases assigned "good faith" an important role in supporting the obligation not to revoke obligations perceived to be created by unilateral declaration, the Court did not assign "good faith" a role in the creation of the basic obligation. It thus appears to be unnecessary, as well as probably futile, to search more deeply into the concept of good faith for the source of the obligation asserted by the ICJ in the *Nuclear Tests* cases Judgment to result from unilateral declarations.

As to the role of "good faith" in inhibiting revocation of an obligation undertaken by unilateral declaration, assuming the unilateral declaration has created an obligation at all, the language of the Judgment of the ICJ in the *Nuclear Tests* cases might be read to imply more than the concept of good faith can logically carry. While good faith may, as the Court points out, underlie the rule *pacta sunt servanda*, it is certainly possible in some cases for a single party legally to terminate its apparent treaty obligations without violating the principle of good faith.²⁸ There is no apparent reason why obligations assumed by unilateral declaration should be harder to terminate than obligations assumed by treaty. Moreover, even if an obligation were considered to be assumed by unilateral declaration, unless that obligation were also considered to include an obligation not to revoke the declaration it is difficult to understand why the principle of "good faith" should inhibit that revocation.²⁹ If the international community were not misled by the unilateral declaration and did not conceive it as creating a direct legal obligation, no significant question of good faith

States. Since the basis adduced for the exercise of the belligerent right was inconsistent with the basis for the assertion of direct governmental authority, the two assertions were inconsistent. If "good faith" has any direct impact in international law, it is to forbid a state taking simultaneous inconsistent positions. Cf. Rubin, *Some Legal Implications of the Pueblo Incident*, 18 ICLQ 961 (1969); 49(1) OREGON L. REV. 1 (1969). But the analogy between such cases and unilateral declarations sought to be considered binding as contracts seems strained.

²⁸ Cf. 1969 Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27, 63 AJIL 875 (1969), Arts. 56, 61-64.

²⁹ Cf. French reaction to the Egyptian declaration of 1957 cited *supra* note 19. A number of publicists granting some legal effect to unilateral declarations of intention consider that later inconsistent declarations would have equivalent legal effects, without any violation of the principle of good faith. Cf. Dehaussy, *La Déclaration Egyptienne de 1957 sur le Canal de Suez*, 6 ANN. FRANÇAISE DE DR. INT. 1960 at 169 (1960), and fasc. 10 and 14 in 1 JURISCLASSEUR DE DR. INT. (1960); Venturini, *La Portée et les Effets Juridiques des Attitudes et des Actes Unilatéraux des Etats*, 112 REC. DES COURS 363, at 403-04 (II, 1964); JAQUÉ, *ÉLÉMENTS POUR UNE THÉORIE DE L'ACTE JURIDIQUE EN DROIT INTERNATIONAL PUBLIC* 321 *et seq.* (1972); Note, *The Effect of Unilateral Acts in International Law*, 2 N.Y.U. J. OF INT. L. & POLITICS 333, 339-41 (1969), attributed to A. Gigante in 6 VERZIJJ, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 111 (1973). *Per contra*, E. SUY, *LES ACTES JURIDIQUES UNILATÉRAUX EN DROIT INTERNATIONAL PUBLIC* 149-51 (1962). Suy seems to conclude that the only way unilateral declarations lose legal effect is by a change in the essential conditions envisaged by the declarant state. He cites no examples of state practice to support this conclusion and his views seem to be based solely on those of other publicists, principally Sir Gerald Fitzmaurice, whose work will be analyzed more fully below.

would seem to arise. The sole legal question would seem to be a mere technical one of whether an express revocation should be required prior to a state's acting in a manner inconsistent with its unilateral declaration, or whether the inconsistent action implying revocation should be conceived to be sufficient to satisfy the legal requirements, if any, flowing from the general obligation of good faith. Assuming that there has been no action or reaction by a second state calling into play principles of estoppel (which will be discussed below), it is difficult to understand how an international claim could arise from a state's acting inconsistently with its prior unilateral declaration of intention even without an express revocation. The technical question seems too inconsequential to warrant further analysis here.

(3). *Presumed Consent*: To frame the supposed binding force of a unilateral declaration in terms of presumed consent³⁰ is to translate strict unilateral declarations that rest on the intention to be bound of the declarant alone and not on "any subsequent acceptance of the declaration," which was the subject of the ICJ Judgment in the *Nuclear Tests* cases, into something else. To rest the obligation on presumed consent seems to shift the basis of the obligation from the intention of the declarant, posited as the sole significant intention by the ICJ in the *Nuclear Tests* cases Judgment, to the reaction of states noting the unilateral declaration. It also assumes an approach by which a unilateral declaration delivered publicly and with no particular addressee creates powers in all states as implied "offerees" to accept by silence the offer contained in the declaration.³¹ This implies in turn a constant negotiating posture, which, as pointed out above, is an approach specifically rejected by the ICJ as the basis for its view of law.

(4). *The Intention of the Declarant*: Sir Gerald Fitzmaurice, focusing on the international law relating to unilateral declarations in his review of the ICJ's activities for 1951-54,³² seems to have given primary emphasis to the otherwise unsupported intentions of the declarant. The case he seems to have had in mind involved the submission of Iran to the jurisdiction of the ICJ which was the subject of litigation in 1952,³³ and that case featured a declaration that received its legal weight from the terms of Article 36(2) of the Statute of the ICJ, not from the isolated act of Iran. But Sir Gerald's further comments on the legal effects of unilateral declarations have been cited by many later writers and have assumed a persuasiveness of their own.³⁴ As will be seen below from his role in some preliminary discussions of third party beneficiary treaties by the International Law Commission, and from his concurring opinion as a member of the ICJ when estoppel was considered in connection with the *Case Concerning the Tem-*

³⁰ Note attributed to Gigante, *supra* note 29, at 346-47. Hints of an equivalent approach are in JAQUÉ, *supra* note 29, at 329 *et seq.*

³¹ Cf. Sux, *supra* note 29, at 128.

³² Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BYIL 230-32 (1958).

³³ Anglo-Iranian Oil Company case, [1952] ICJ REP. 93.

³⁴ Cf. Sux, *supra* note 29, at 149; Note (Gigante?) *supra* note 29, at 334, 342, 350.

ple at *Preah Vihear*,³⁵ Sir Gerald clarified his thinking considerably as he delved deeper into the issues related to unilateral declarations. But it is impossible fully to understand the later doctrinal writings without at this point considering his influential early dicta.

In his early analysis of the legal effects of unilateral declarations, Sir Gerald began by dividing them into three subsets: (1) Declarations which are unilateral neither in substance nor in form; (2) Declarations that are unilateral both in form and in substance; and (3) Declarations that are unilateral in form but not in substance. The first subset is considered to include only treaties, the label "Declaration" being used by states for other purposes than to define the legal form or effects of the transaction. With regard to the *third* subset, Sir Gerald addressed the legal status of declarations under Article 36(2) of the Statute of the International Court of Justice and noted that in the *Anglo-Iranian Oil Company* case, the Court concluded that the text of the Iranian declaration, not being the result of bilateral negotiations, was not to be interpreted as if it were the text of a treaty, but rather with an eye to various "extraneous elements" (Sir Gerald's phrase).³⁶ The extraneous elements the court looked to were various factors in the history of Iran and its capitulation treaties which the Court felt shed light on the intentions of Iran that lay behind repetitious language in the Iranian declaration. Since the reasoning of the Court in going to this sort of evidence of Iranian intention was that the Iranian declaration was not a negotiated document but a document drafted wholly by Iran, it was Sir Gerald's conclusion that extraneous elements to determine the intention of a declarant are "*a fortiori*" (Sir Gerald's language)³⁷ applicable to cases of type two, true unilateral declarations.

This conclusion seems correct as far as it goes. But it should be borne in mind that in context it does not go very far. The search for extraneous evidence of Iran's intentions in the *Anglo-Iranian Oil Company* case had nothing to do with whether or not Iran intended to be bound by its declaration. From the fact that Sir Gerald placed his discussion of the Iranian declaration under his category three, "declarations that are unilateral in form but not in substance," it seems clear that Sir Gerald himself was concerned with the issue of interpretation, not the issue of the legal effect of the declaration itself to bind Iran. On the other hand, in his discussion, Sir Gerald seems to refer to the declarations of the United Kingdom and Iran as forming a contract independent of Article 36(2) of the ICJ Statute; but his language is unclear and no basis is stated for characterizing the declarations as something like cross-offers and cross-acceptances.

As to his category two, the only one directly pertinent to this study, Sir Gerald wrote:

Such a declaration may or may not create binding legal obligations for the declaring party, according to its wording and intent, and the circumstances of its making; but it seems fairly well settled that it can and will do so if clearly intended to have that effect and held

³⁵ [1962] ICJ REP. 6.

³⁶ Fitzmaurice, *supra* note 32, at 232.

³⁷ *Ibid.*

out, so to speak, as an instrument on which others may rely and under which the declarant purports to assume such obligations. Particularly will this be so where other countries have, on the faith of the Declaration, changed their position or taken action on the basis of it.³⁸

The second of these two quoted sentences suggests that Sir Gerald had in mind some theory based on reliance by second states rather than the intention of the declarant state. But the first sentence seems absolute, and the word "particularly" implies that the binding effect of a true unilateral declaration will be felt even without second state reliance. No citation or argumentation is given in support of the assertion that the stated rule seems "fairly well settled." Nor is it clear why Sir Gerald believed that action in reliance is enough to create an obligation in international law. In Anglo-American contract law, the action to "estop" a promising party from withdrawing his promise must be action *to the legal detriment* of the promisee, and even when it is clear that such action has taken place there are real questions as to the extent to which the estoppel will be applied.

After distinguishing, as we have done above with regard to category three, between questions of interpretation and questions of whether the unilateral declaration gives rise to binding legal obligations at all, Sir Gerald wrote:

A more subtle point arises over the question of determining *whether* the instrument concerned does or does not create or give rise to binding legal obligations . . . and on this aspect of the matter a tribunal may therefore [*sic*] reasonably adopt an approach based on such extraneous considerations. This is so, as will be seen, even as regards case (iii) below, and must apply *a fortiori* in respect of case (ii), in which the element of contract is lacking.

But the argument in category three related to the question of the intention of the declarant and the use of extraneous evidence to discover that intention. It did not go to the point of holding that declaring an intention to be bound would be sufficient of itself to create an obligation. Since the obligation in category three arose from Article 36(2) of the Statute of the Court and not from any extraneous evidence of Iranian intentions, to apply it to category two is not a matter of reasoning *a fortiori* at all.

Aside from writings deriving directly from this article by Sir Gerald Fitzmaurice,³⁹ there is no support in learned opinion prior to the ICJ Judgment in the *Nuclear Tests* cases for the proposition that the intention to be bound of a state publicly issuing a unilateral declaration is by itself sufficient to create a legal obligation.

(5). *Waiver*: The French position that the Egyptian declaration of 1957 could be revoked by Egypt at any time was analyzed in the light of precedent and French municipal law by one writer who concluded that this French position was consistent with past French practice only if "*renonciations*," (what in Anglo-American law would be called "waivers") were

³⁸ *Id.* 230.

³⁹ Such as *Suy*, *supra* note 29, at 149-51.

excluded from consideration.⁴⁰ In French municipal law, a waiver of rights might be made unilaterally, and at one time France formally took the position that a "waiver," as a unilateral act in international law, was binding on the waiving state.⁴¹ This dichotomy between unilateral declarations of intention and waivers of rights is not subject to a clear distinction. Is a unilateral declaration of an intention not to exercise a right better labeled a "promise" or a "waiver"? In the *Nuclear Tests* cases, cannot the French statements be construed to be a "waiver" of French rights to test nuclear devices in the atmosphere? Could not the Egyptian declaration of 1957 be construed to be a "waiver" of possible Egyptian powers (if not rights) to control the Canal in total disregard of the 1888 Constantinople Convention?

In Anglo-American municipal law, the concept of waiver and its legal results are far from clear, and there is no reason to suppose that the situation in international law is any clearer. American law sees "waiver" as the "intentional relinquishment of a known right."⁴² The central issue, as always, is whether, in the absence of some action in reliance on the statement, the waiver that came as a unilateral act can be revoked unilaterally. There are even cases holding that a waiver does not exist until some action in reliance has given rise to an "estoppel" and that "waiver" is only a special case of estoppel precluding the waiving party from claiming a breach of contract from the other party's failure to perform some contractual duty that has been "waived."⁴³ Also in many cases a "waiver" has been held to be irrevocable despite the absence of "detrimental reliance" by the misled party.⁴⁴

In practice, the Anglo-American law relating to waivers concerns not rights but "conditions," and its applicability is doubtful in other than special cases like insurance contracts and construction contracts, where failure to develop a legal doctrine to mitigate the forfeitures that a strict application of the normal law of conditions would involve would create hardships.⁴⁵

Whether the French law of "*renonciation*" is similarly restricted involves research beyond the reasonable limits of this article. It is already clear that the French position admits of exceptions that, when interpreted in the light of Anglo-American analogies, can be interpreted to be as large as the basic rule itself. It would appear to be true in French law, as in Anglo-American municipal law, that a "*renonciation*" or "waiver" is not effected by a promise not to insist on rights or not to exercise powers unless something more than the immediate intention of the "waiving" or

⁴⁰ Kiss, *Les Actes Unilatéraux dans la Pratique Française de Droit International*, 65 REV. GÉN. DE DR. INT'L PUBLIC 317-23 (1961).

⁴¹ Argument presented for France by M. Basdevant in the Free Zones of Upper Savoy and Gex case, [1932] PCIJ ser. C, No. 58, at 586-88.

⁴² BLACK'S LAW DICTIONARY 1751 (4th ed. 1968) and cases cited there.

⁴³ CORBIN ON CONTRACTS 705-11 (§§752-53) (1952); RESTATEMENT OF THE LAW OF CONTRACTS §297 (1932).

⁴⁴ *Clark v. West*, 193 N.Y. 349, 86 N.E. 1 (1908); *Lee v. The Casualty Company of America*, 90 Conn. 202, 96 A. 952 (Sup. Ct. Err. 1917).

⁴⁵ Cf. *City Stores Co. v. Ammerman*, 266 F.Supp. 766 (D.C.D.C. 1967).

"renouncing" party is involved, *i.e.*, something like forfeiture or action in detrimental reliance.

In fact, in international law, the word "waiver" is normally used to refer to the outcome of a negotiation where one party agrees not to assert the privilege or immunity to which it is entitled in international law.⁴⁶ Such a "waiver" is not a unilateral act. Since there is no requirement of "consideration" or "causa" to support the validity of an international commitment,⁴⁷ as there is in the municipal law of contract, the possible analogy to the municipal law relating to "waiver unsupported by estoppel" is misplaced. An "estoppel" need not replace the normal requirement of consideration where consideration is not a normal requirement. No cases of a "waiver" of rights by unilateral declaration unsupported by estoppel appear to be cited in connection with any known analyses of the international law relating to the binding effects of unilateral declarations.

Thus a rule relating to "*renonciation*" which is peculiar to French municipal law cannot take its place as a "general principle" of law recognized by civilized nations under Article 38 of the Statute of the Court.⁴⁸ Such an analysis would clearly be inconsistent with fact and the French position in the instance of the Egyptian declaration.

(6). *The Power of Ambiguity*: An argument has been made that, in the absence of other factors, the issue whether a unilateral declaration should be regarded as binding is a question of the degree to which the international order needs to feel confidence in the continued effectiveness of the declaration; that in the absence of other indicators, this is a matter of context and subject to flexibility.⁴⁹ But if context and flexibility are the governing factors, then it would seem that assertions of either early vesting of rights in a state or states at which the declaration is aimed, or of absolute nonvesting of rights, would be equally misplaced; the law of unilateral declarations is inherently vague.

Vagueness in formulations of law is equivalent to allowing for disagreement by contesting parties and latitude for discretion in tribunals or negotiators. There is indeed a real function to deliberate vagueness in the law, particularly in a horizontal legal system in which the subjects of the law

⁴⁶ As in, *e.g.*, 1961 Vienna Convention on Diplomatic Relations, TIAS No. 7502; 500 UNTS 95; 55 AJIL 933 (1963). Art. 32.

⁴⁷ See CORBIN, *supra* note 43, at §111, and Schlesinger, *supra* note 20, at 72, 1256, as to the municipal law requirements of "consideration" or "causa." Judge de Castro in his Dissenting Opinion in the *Nuclear Tests* cases argues that there is an equivalent requirement at international law to make a promise binding. *Nuclear Tests* cases, *supra* note 2, at 374. Various equivalents have been suggested, such as the "mutual benefit" term of the China-India "Panch Shila" Agreement of 1954 (GOVERNMENT OF INDIA, NOTES, MEMORANDA AND LETTERS EXCHANGED AND AGREEMENTS SIGNED BETWEEN THE GOVERNMENTS OF INDIA AND CHINA 1954-1959 98 (1959)) but this is not the place to analyze the degree to which various states and publicists have urged such formulae. There is no requirement equivalent to "consideration" or "causa" mentioned in the 1969 draft Vienna Convention on the Law of Treaties.

⁴⁸ Art. 38(1)(c). See Ch. II of H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW §29, at 67-71 (1927).

⁴⁹ Venturini, *supra* note 29, at 403-04.

prefer "autointerpretation"⁵⁰ and negotiation to certainty. Under this approach, while it might be possible to construe the French unilateral declarations in the *Nuclear Tests* cases into a French obligation of some sort, that conclusion could not be supported by any fixed rule of international law. Nor would any principle of good faith make the purported obligations irrevocable. Thus it seems clear that this approach, while interesting and providing a possible basis for the conclusion of the ICJ in the *Nuclear Tests* cases, is fundamentally inconsistent with the approach actually taken by the Court.⁵¹

(7). *Estoppel*: Municipal legal systems permit naked promises to be revoked but recompense individuals for some of the harm caused by the revocation of the promise; they permit uncertainty (by allowing revocation without penalty), while assuring stability (by providing nonpenal compensation for some losses caused by foreseeable reliance on the promise). Anglo-American lawyers refer to this important area of law as the law of "estoppel," while continental European legal systems have an analogous concept of "preclusion" or "forclusion." In many cases international tribunals have referred to estoppel, preclusion, or equivalent terms. The most recent case in which the international law analogous to the Anglo-American and continental European municipal law of estoppel or preclusion was discussed critically was the *Case Concerning the Temple at Preah Vihear*.⁵² The case does not involve any precedent for unilateral declarations, since the critical issue was not the legal effect of any discrete unilateral act but of long continued practices the repudiation of which would disrupt what the ICJ regarded as an established stability. An understanding of this situation, called "equitable estoppel" in Anglo-American law, is essential to an understanding of the development of doctrines of "promissory estoppel" to be outlined below and of their place in the legal order.

The Judgment of the Court did not mention estoppel or preclusion at all but construed an agreement between Thailand and Cambodia to have been created out of a negotiation in which French cartographers (acting for Cambodia) drew a boundary line on a map and Thailand by its long continued silence appeared to acquiesce in the line. But in his Separate Opinion, Judge Alfaro asserted the existence of an "anti-inconsistency rule" in international law.⁵³ He distinguished this rule from the Anglo-American law of estoppel and the continental European laws relating to "preclu-

⁵⁰ See Gross, *States as Organs of International Law and the Problem of Autointerpretation*, in LIPSKY (ed.), *LAW AND POLITICS IN THE WORLD COMMUNITY* 59 (1953).

⁵¹ The more natural result of the approach positing uncertainty would seem to be a holding of nonjusticiability. There is no necessary conflict between the theoretical position that all contentions between states can be resolved by the application of rules of international law (cf. H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 134-35 (1933)), and that in a horizontal legal order some disputes are inevitably withheld from third-party settlement (Brownlie, *The Justiciability of Disputes and Issues in International Relations*, 42 *BYIL* 123 (1967)).

⁵² Cited note 35 *supra*.

⁵³ *Id.* 51.

sion" and "forclusion," saying that in his view none of them accords exactly with the doctrine as applied in international cases.⁵⁴ He found the rule against inconsistency applied in international cases to be based primarily on good faith, secondly on analogy to the municipal law of contract, and thirdly on analogy to "prescription" and a supposed public policy of avoiding controversies.⁵⁵ It is impossible in limited space to analyze all of Judge Alfaro's cited precedents. None seems to involve a unilateral declaration of intention with nothing more. Sir Gerald Fitzmaurice, in his own Concurring Opinion in the same case,⁵⁶ examined the international law analogous to estoppel or preclusion and concluded:

The essential condition of the operation of the rule of preclusion or estoppel, as strictly to be understood, is that the party invoking the rule must have "relied upon" the statements or conduct of the other party, either to its own detriment or to the other's advantage. The often invoked necessity for a consequent "change of position" on the part of the party invoking preclusion or estoppel is implied in this . . . the essential question is and remains whether the statements or conduct of the party impugned produced a change in relative positions, to its advantage or the other's detriment. If so, that party cannot be heard to deny what it said or did.⁵⁷

Sir Percy Spender in his Dissenting Opinion also addressed the impact of the "principle of preclusion" on the case, concluding that Cambodia's failure to plead the law relating to preclusion until very late in the day is a circumstance not to be disregarded,⁵⁸ and that even if properly argued, it is doubtful that the facts would fit the legal concept because "France never acted upon the faith of any representation which may be inferred from Thailand's conduct."⁵⁹

In short, it appears that Judge Alfaro was the only member of the ICJ in 1962 to hold that there is an "anti-inconsistency" principle in international law that binds a state to its view of fact or law in the absence of reliance. He could cite neither prior cases nor legal argument to support his view. The only publicist discovered attempting to apply his views about an "anti-inconsistency" rule based on good faith to unilateral declaration has been Gigante who eventually concluded that unilateral declarations of intention with nothing more are *not* binding.⁶⁰

Judge Alfaro was certainly right in observing that there is no necessary direct correspondence between rules of municipal law and rules of international law. Article 38(1)(c) of the Statute of the ICJ in providing for the reception into international law of rules of municipal law, speaks only

⁵⁴ *Id.* 39.

⁵⁵ *Id.* 42. *Sed quaere* in the light of section 6 above whether it is correct to assume a public policy of avoiding controversy.

⁵⁶ *Id.* 52, esp. 62-65.

⁵⁷ *Id.* 63-64.

⁵⁸ *Id.* 101, at 144. Sir Percy did not expressly draw the obvious inference that Judge Alfaro was using a different yardstick to measure the legal effect of Thailand's silence than to measure Cambodia's.

⁵⁹ *Id.* 144.

⁶⁰ Note (Gigante?), *supra* note 29, at 349-50.

of "the general principles" of municipal law, not the full range of exceptions and qualifications. But in considering the Anglo-American municipal law of estoppel, it is doubtful that "general principles" are sufficient to define coherent rules; the Anglo-American municipal law relating to estoppel is extremely complex. Lord McNair, after citing some leading English definitions of estoppel⁶¹ did not notice or, at least, did not seem to think it significant that in the 1923 Tinoco Arbitration⁶² the Arbitrator, U.S. Chief Justice Taft, considered applying rules *not* of "estoppel" but of "equitable estoppel"—a concept not encompassing the entire range of ideas conveyed by the doctrine of estoppel itself.⁶³ But the complexities of the Anglo-American law of estoppel were well known to Lord McNair, and in his translation of the municipal law concept of estoppel into international law terms in 1924, shortly after the Tinoco decision was announced, he asserted merely "that an international tribunal could hardly fail to be unfavorably impressed by . . . inconsistencies in the event of a direct juridical issue being raised . . ."⁶⁴

It may be significant that thirty-three years later Lord McNair, writing expressly on "The General Principles of Law Recognized by Civilized Nations," avoided any mention of estoppel, focusing instead on respect for acquired rights and what he called the "principle of unjust enrichment."⁶⁵

⁶¹ Principally Lord Denman's definition in *Packard v. Sears* [1837] 6 A&E 469 at 474:

Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time, . . .

⁶² 1 R.I.A.A. 369 (1948).

⁶³ In that case, Justice Taft in fact held the concept of "equitable estoppel" inapplicable because no detrimental reliance by Costa Rica could be shown to have resulted from the British act of nonrecognition, and it is clear that no other aspect of the concept of estoppel was felt to be more directly pertinent to the facts of the case.

⁶⁴ McNair, *The Legality of the Occupation of the Ruhr*, 5 BYIL 17 at 35-36 (1924).

⁶⁵ 33 BYIL 11, 15-16 (1957). Of course, there is no "principle of unjust enrichment" known to any civilized legal system except to forbid it. In Anglo-American law the term covers a very complex area of law which for historical, not logical, reasons has been classified with the usual discussions of the common law of contract. The term has been attached to some situations, like the performance of a professional service to a person unable to signify assent (*Cotnam v. Wisdom*, 83 Ark. 601, 104 S.W. 164 (1907)), the performance of some second party's duty by one threatened with injury by the second party's default (*Sommers v. Putnam Board of Education*, 113 Ohio St. 177, 148 N.E. 682 (1925)), and some cases in which a contract being void for mutual mistake the normal rules would lead to the entire loss being borne by an innocent party (*Vickery v. Ritchie*, 202 Mass., 247, 88 N.E. 835 (1909)), with the result that the court creates a fictitious "contract" (normally called "quasi-contract") between the parties and awards the "impoverished" party damages equal to the reasonable value of his services. This is not the place to analyze the use of the concept in detail. In the A.L.I. *Restatements* the law of unjust enrichment has been codified *not* in the *Restatement of the Law of Contracts* but in the *Restatement of the Law of Restitution* (§§112-14) (1937).

Lord McNair argues in favor of a general principle of law relating to unjust enrichment through the precedent of the *Lena Goldfields* arbitration of 1930 (5 ANN. DIG. 1929-1930, Cases 1 and 258), in which the tribunal held that the existence of rules relating to disgorging property to which a party has no just right, being found

To those familiar with the use of the phrase "unjust enrichment" in Anglo-American law,⁶⁶ it must come as something of a surprise to find a tribunal preferring it to normal measures of damages law in a case where either approach leads to the same result, and the reasons why Lord McNair raised one particular tribunal's preference to the status of a leading case and "unjust enrichment" to the status of a general principle of law recognized by civilized states are not clear.

The delicacy of Lord McNair's treatment of the concept of "estoppel" in 1924 and his failure to include "estoppel" in his discussion of general principles in 1957 encourage circumspection about the doctrine, despite the evidence that Lord McNair himself finally concluded that something like the English law of estoppel had been adopted into the corpus of general international law.⁶⁷ Lord McNair remained doubtful that any concept of estoppel that would give third parties any rights under a treaty between others had been received into general international law.⁶⁸ A *fortiori*, it would seem doubtful under Lord McNair's analysis of the precedents and principles that a unilateral declaration alone could give rise to an estoppel barring revocation of the declaration. His discussion of the scope of the concept is confined to questions of treaty interpretation, where one party is estopped to change to its benefit an interpretation of a treaty conveyed by words, deeds, or significant inaction to the other party, and to approving the views advanced by Bowett on estoppel.⁶⁹

Lord McNair's observations of 1924 that international tribunals could be expected to prefer consistency to inconsistency in the behavior of states, implying a gingerly acceptance of the public policies underlying the municipal law of estoppel even if not a rigid application of that law in all its force, was affirmed and expanded by H. Lauterpacht a few years later.⁷⁰

in English, French, German, and Scots law, was adequate as a basis for applying the concept to measure the damages resulting from a Soviet Russian breach of contract. The tribunal also noted that "ordinary legal principles" would lead to identical damages. It seems clear that the "principle of unjust enrichment" as used in the Lena Goldfields arbitration is a minor and probably unnecessary part of the law on the measure of damages. The "principle" does not relate to estoppel or unilateral declarations at all, since the existence of a violation of international law (like the breach of contract in the Lena Goldfields arbitration) is necessary before any question of damages arises, while the binding force of unilateral promises turns on the fundamental prior question of whether there has been a breach of the law at all, *i.e.*, whether an "enrichment" has been "unjust."

⁶⁶ The closest to an incisive analysis may be that of Judge Jerome Frank in *Martin v. Campanaro*, 156 F.2d 127 (2d Cir. 1946), or Note, *Quasi-Contractual Recovery for Part Performance of a Contract*, 44 HARV. L. REV. 623 (1931). See also the treatment of "unjust enrichment" as a measure of damages in "bad faith" cases, in Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 VA. L. REV. 195 (1968). The literature on "unjust enrichment" in Anglo-American contract law is vast.

⁶⁷ McNAIR, *THE LAW OF TREATIES* 485-89 (1961).

⁶⁸ *Id.* 489.

⁶⁹ Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 BYIL 176 (1957).

⁷⁰ LAUTERPACHT, *supra* note 48, at 203-11, esp. 203-06.

Lauterpacht noted that similar policies existed in "all systems of private law" and cited seven arbitral awards to support the thesis that this municipal law concept had been accepted into the corpus of public international law.⁷¹ But none of his examples and none of his logic relates to unilateral declarations of intention taken alone.

This should not be surprising. At the time Lauterpacht was writing, the municipal law relating to what later was called "promissory estoppel" in American law was not only undeveloped, but was denied in all except a very few marginal cases. At the time the American law of contract was codified by the *Restatement of the Law of Contracts* (1932), the idea that a promisor could be held to his naked promise had been applied only in very exceptional circumstances;⁷² the drafters of section 90 of that *Restatement* made it clear that they were laying down new law, not codifying it. It is questionable that the contract law relating to gratuitous promises is even today broad enough to apply to more than a few isolated cases, principally those in which there has been definite and substantial foreseeable reliance by a promisee to his obvious detriment.⁷³

In these circumstances, it is not surprising to find Lauterpacht apparently ignoring the possible applicability of the principles that underlie the municipal law of estoppel or preclusion to mere declarations of intention, as distinguished from assertions of fact or unrevoked statements of position in a negotiating situation.

In theory, the law of promissory estoppel, such as it is, is not based on the virtues of consistency and has only an uncertain relationship to obligations of "good faith" in municipal law. Instead, it is based on the so-called reliance theory of contract.⁷⁴ To the degree a declaration of intention is

⁷¹ In two cases the positions which the precluded state asserted involved admissions of preexisting liability; in three they involved positions held to in bilateral negotiations; in one the question was one of treaty interpretation only; and in the last it was a question of *res judicata*, which Sir Hersch considered a species of estoppel. An eighth case, the Tinoco Arbitration (cited note 62 *supra*) was taken by Lauterpacht as evidence that "equitable estoppel" would have been applied as a matter of public international law if Justice Taft had been persuaded that the facts justified resort to that concept.

⁷² Cf. CORBIN, *supra* note 43, at §§193-208, esp. §§193 and 204.

⁷³ Cf. Summers, *supra* note 66 *passim*.

⁷⁴ The "reliance" theory has ancient roots. (see Lord Wilmot's and Justice Yates's opinions in *Pillans and Rose v. Van Mierop and Hopkins*, 97 Eng. Rep. 1035 (K.B. 1765)) but languished during the 19th century as the formalism of "consideration" came to be seen as a stronger basis for predictability and therefore a better basis than "reliance" for deciding which commercial promises should be enforced at law and which should be disregarded.

Central London Property Trust Ltd. v. High Trees House Ltd., [1947] 1 K.B. 130, is the leading English case relating to promissory estoppel and has spawned much learned comment. See works cited in KESSLER & GILMORE, *CONTRACTS CASES AND MATERIALS* 498 (2d ed. 1970).

The leading American cases basing recovery on "promissory estoppel" and *Restatement* (1932) section 90 include *Feinberg v. Pfeiffer Co.*, 322 S.W. 2d 163 (1959); *Hoffman v. Red Owl Stores*, 26 Wis. 2d 683, 133 N.W. 2d 267 (1965); *Goodman v. Dicker* (C.A.D.C.) 83 U.S. App. D.C. 353, 169 F.2d 684 (1948); *Chrysler v. Quimby*, 51 Del. 264, 144 A.2d 123 (1958). Other cases occasionally cited as illustrating

enforced as if it were a contractual promise in Anglo-American municipal law, it is as a recognition of the social desirability of holding the gratuitous promisor to his promise as a last resort to avoid injury to one who has acted to his detriment in reliance on the promise. The reliance theory presumes that the promise is not enforceable as a whole; it presumes that a legally effective revocation can occur with regard to all or any part of the promise at any time prior to the promisee's acting in reliance on it, and that even then, justice might be done without holding the promisor to his declared intention.

To modern analysts, the Anglo-American law of estoppel seems merely a corollary to the law that has historically required some formality (seal, "consideration" etc.) as an addition to the naked promise before the courts will enforce it. The continental European equivalent, while not identical, calls for "causa"—some additional element to take the promise out of the class of a revocable declaration of intention to give a gift and to place it in the class of obligations.⁷⁵ From this point of view, there is no question of "good faith." There is the judicial acceptance in some fringe cases of "reliance" as substituting for the normal requirement of some formality such as consideration. Thus, the only "general principle of law" lying behind the law of promissory estoppel is the general principle that promises are *not* enforceable in law *unless* accompanied by something else that is legally substantial.

Since 1932 no change has taken place in the United States to alter this evaluation of the role of promissory estoppel in contract law. Where the 1932 *Restatement* required that the necessary action induced by the promise be not only foreseeable but also "of a definite and substantial character," the 1965 redraft drops "definite and substantial character" but provides that the remedy for breach of the promise "may be limited as justice requires." Both versions require some foreseeable action or forbearance by the promisee (or a third person in the 1965 draft) and in-

promissory estoppel have been relegated by most analysts to other aspects of the law of contract, such as "firm offer" cases. *Cp. Baird Co. v. Gimbel Bros.* (C.A. 2d Cir.) 64 F.2d 344 (1933) (Learned Hand rejecting the applicability of promissory estoppel and upholding the power of an offeror to revoke his offer despite the offeree's acting to his detriment in reliance on its remaining open); *Drennan v. Star Paving Co.*, 51 Cal.2d 409, 33 P.2d 757 (1958) (Justice Traynor in equivalent facts applying *Restatement* (1932) sec. 90 to hold the offeror to his offer); see *UCC* sec. 2-205. Many cases exist in which courts simply refuse to apply promissory estoppel where advocates of the doctrine would argue for it. See, in addition to *Baird v. Gimbel supra*, *Pitts v. McGraw-Edison Co.* 329 F.2d 412 (6th Cir. 1964); *Tatsch v. Hamilton-Erickson Mfr. Co.*, 76 N.M. 729 P.2d 187 (1966). In addition to some "firm offer" cases, the cases applying promissory estoppel doctrine seem to involve only very unequal bargaining power or business franchises, with the superior power or franchisor withdrawing from a negotiation after having induced the weaker or franchisee to take some major detrimental action.

⁷⁵ See note 47 *supra*. Both Corbin and Schlesinger also view "consideration" as a formality rather than an independent requirement. There are many articles on both topics; the works cited in Kessler and Gilmore (*supra* note 74 at 203-06) provide a good starting point.

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dicate in very strong language that the promise is binding "if injustice can be avoided only by [the (1932)] enforcement of the promise." The situations cited above at note 74 in which judges may feel that injustice can be avoided only by the application of the rules of promissory estoppel make exciting reading, but they are few in number and all involve definite and substantial reliance by the successful plaintiffs.

It may be concluded that there is no known general principle of Anglo-American law that makes a unilateral declaration of intention binding on the declarant in the absence of an acceptance bringing the situation into the ambit of contract law or some detrimental reliance bringing the situation within the law relating to preclusion or promissory estoppel. To the extent promissory estoppel is part of Anglo-American law, it makes a unilateral promise binding only to the extent necessary to avoid an unjustifiable loss to the party relying on it. The concept of equitable estoppel, while having broader effects, is clearly distinguishable from the concept of promissory estoppel in Anglo-American law and itself rests on the idea of avoiding an unjust enrichment. There appears to be no support in any known private law system for holding a declaration of intention or assertion of fact binding on the declarant unless the effect of the declaration or assertion of fact has been foreseeably to provoke some action on the part of another and some legal detriment to him or equivalent benefit to the declarant for which compensation should be provided.

Nothing in recent international law doctrine has been found inconsistent with the foregoing analysis. Bowett⁷⁶ clearly restricts his discussion of the international law of estoppel to situations in which there has been an unequivocal assertion of fact (not a promise) and a reliance in good faith by some second party either to his disadvantage or to the advantage of the declarant. He distinguishes *res judicata* and admissions of liability or damaging facts as not estoppel proper and as merely probative, not conclusive; he thus disagrees with Lauterpacht's more general assertions relating to the reception of the municipal law of estoppel or preclusion into public international law.

Similarly, the leading article by I. C. MacGibbon,⁷⁷ in arguing for the increased persuasiveness of "estoppel" as an independent ground for evaluating legal relationships as distinct from "good faith," sees a trend toward expanding the variety of cases to which the concept of "estoppel" applies but cites no cases holding that a unilateral declaration with nothing more is irrevocable. To the extent that he argues for an increasing use of the concept of estoppel, he is arguing *de lege ferenda* and gives no reasons why the declarations of intention by states, as distinguished from their assertions of fact, admissions, or recognition, should be regarded as irrevocable.

As to the International Court itself, Judge Alfaro's dictum in the *Temple* case appears to stand alone in the degree to which it seeks to transform

⁷⁶ *Supra* note 69.

⁷⁷ MacGibbon, *Estoppel in International Law*, 7 ICLQ 468 (1958).

equitable estoppel or some notion of preclusion into an "anti-inconsistency rule." This rejection of the asserted rule by the Court was made explicit in the 1969 Judgment in the *North Sea Continental Shelf* cases.⁷⁸ In that Judgment a majority of eleven Judges, including Sir Gerald Fitzmaurice, expressly defined the scope of the international law analogous to the Anglo-American law of estoppel to include a requirement of detrimental reliance before a "declaration" would be held binding on a declarant state. One of the eleven (Judge Padilla Nervo) and four of the dissenters (Judges Koretsky, Tanaka, Lachs, and Sørensen) expressed views that might, with some ingenuity, be interpreted to be inconsistent with the majority on this point, but the issue was not expressly joined and there is no citation to Judge Alfaro's opinion in the *Temple* case.

(8). *Third-Party Beneficiary Contracts; Approach of the International Law Commission*: There is an analogy between treaties that confer benefits on a third party and unilateral declarations that benefit a second party. The analogy is not precise, because direct third-party rights, if they exist at all, must rest on an acknowledgedly binding treaty, while the question in the case of a unilateral declaration is whether it is binding at all. Nevertheless, unilateral declarations were seen as a special case of third-party beneficiary agreements in 1960 by Sir Gerald Fitzmaurice as Rapporteur for the International Law Commission's work on the law of treaties.⁷⁹ Fitzmaurice proposed a provision in his draft Convention on the Law of Treaties under which the obligations of the declarant state contained in a unilateral declaration would be legally binding and the benefited state(s) legally entitled to claim the performance of the declaration.⁸⁰ In his commentary, he simply states the "rule" to be derived by legal logic from a rule stated earlier concerned with a "separate issue."⁸¹ In the comment on the "separate issue," he had written:

This paragraph is intended to be so worded as not to prejudge the question of the circumstances in which a purely unilateral declaration can, under international law, create binding obligations for the declarant state . . . The question . . . is not really a part of the present subject.

⁷⁸ *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), [1969] ICJ REP. 3, at 26 (para. 30).

Having regard to these considerations of principle, it appears that only the existence of a situation of estoppel could suffice to lend substance to this contention,—that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice.

It may be of note that the word "estoppel" appears also in the parallel French text, rather than the word "preclusion": "... seule l'existence d'une situation d'estoppel pourrait étayer pareille thèse ..."

⁷⁹ Fifth Report on the Law of Treaties, UN Doc. CN.4/130, reprinted in A/CN.4/Ser.A/1960/Add.1, [1960] 2 Y.B. INT. L. COMM. 69-107.

⁸⁰ *Id.* 81 (Art. 22.) See also draft Arts. 11 and 12 at 79.

⁸¹ The "separate issue" involved adherences by unilateral act to a preexisting treaty among others. See *id.* 105 (comment on draft Art. 22), 91 (comment on draft Art. 12).

No further argument or citation is given for the article and commentary addressed to unilateral declarations. In the cases of both the uninvited adherence to a treaty concluded by others and the purely unilateral declaration, Fitzmaurice indicated that in his view the obligation, if any, is terminable at will by the declarant (or third) state, subject to an obligation to recompense "any other State" which has acted to its detriment in reliance on the "faith of the declaration."⁸² This approach, which seems more reminiscent of the Anglo-American law of promissory estoppel than the attribution of inherent binding force to a unilateral declaration, is stated in the commentary by Fitzmaurice as frankly a proposal *de lege ferenda*.⁸³ He regarded his own formulation as "entirely speculative," stating that "there seems to be no authority on the point."⁸⁴ The subject was excised from the International Law Commission's draft on the Law of Treaties in 1964,⁸⁵ as not properly within the agreed definition of "treaty."

(9). *Conclusions*: It may be concluded from this review of doctrine, that as of the time the ICJ produced its Judgment in the *Nuclear Tests* cases there was no real support in theory for the proposition that a unilateral declaration, not made in a negotiating context and provoking no reaction from second states, created an obligation or, to the extent that it created legal effects, put them beyond reach of cancellation by the declarant state. Limitations on the power of the declarant state to return the legal situation to that prevailing prior to its having issued its unilateral declaration were perceived to rest on reactions of other states in detrimental reliance on the declaration or on an approach to the nature of the legal order inconsistent with the approach taken by the Judgment of the ICJ in the *Nuclear Tests* cases.

III

THE NUCLEAR TEST CASES

Whether or not the rule of international law propounded by the ICJ Judgment in the *Nuclear Tests* cases, giving the force of legal obligation to unilateral declarations "given publicly, and with an intent to be bound" with nothing more, is well grounded in precedent or doctrine, the application of the rule to the unilateral declarations in the *Nuclear Tests* cases may help to clarify its scope.

The declarations which the Court held fit the rule were six in number:

(1). A communique issued by the Office of the President of the French Republic on June 8, 1974 indicating that

... [In] view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on

⁸² *Id.* 79 (Art. 12(3) referring the reader to the later material in the commentary), 81 (Arts. 20(4) and 22(2)), and 103-05 (commentary to draft Arts. 20(4) and 22).

⁸³ *Id.* para. 90 at 104.

⁸⁴ *Id.* para. 93 at 105.

⁸⁵ See Waldock's comment as Special Rapporteur, UN Doc. A/CN.4/167, reprinted in A/CN.4/Ser.A/1964/Add.1, [1964] 2 Y.B. INT. L. COMM. 27.

to the stage of underground explosions as soon as the series of tests planned for this summer is completed;

(2). A Note dated July 10, 1974 from the French Embassy in New Zealand to the New Zealand Ministry of Foreign Affairs repeating verbatim the part of the June 8 communique quoted above⁸⁶ and adding:

Thus the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type;

(3). A statement at a press conference by the President of France on July 25, 1974:

[T]he Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government's programme. He had indicated that French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect . . . ;

(4). A statement in a television interview by the French Minister of Defense on August 16, 1974 that the French Government had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests;

(5). A statement to the UN General Assembly by the French Minister for Foreign Affairs on September 25, 1974:

We have now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing; and we have taken steps to do so as early as next year;

and

(6). A statement at a press conference by the French Minister of Defense on October 11, 1974 indicating that there would not be any atmospheric tests in 1975 and that France was ready to proceed to underground tests.⁸⁷

The ICJ found the statements of July 25 and October 11, 1974 (numbers 3 and 6 above) particularly important because not qualified with the earlier proviso "in the normal course of events."⁸⁸

But possible qualifications in the French declarations involve questions of interpretation directed at the substance of the presumed undertaking. The preliminary question whether the French unilateral declarations evi-

⁸⁶ The English translations given by the ICJ differ; the original French in the passage quoted is the same in both notes. The differences in translation are not significant for present purposes.

⁸⁷ [1974] ICJ REP. 265-66 (paras. 34-40) (Australia v. France), 469-71 (paras. 34-43) (New Zealand v. France). The Judgment in the case of New Zealand v. France includes additional material relating to New Zealand's responses to the second French declaration, the Note of July 10, 1974, and a French clarification dated July 1, 1974. Since this additional correspondence was not "public" and was given in the course of direct correspondence between states, its relevance to any issues relating to unilateral declarations as defined by the Court in its Judgment seems marginal.

⁸⁸ *Id.* 267 (para. 41) (Australia v. France), 472 (para. 44) (New Zealand v. France).

denced an intent to be bound is not affected by questions of interpretation going to the substance of the supposed commitment.

The best evidence of an intention to be bound lies in prior French opinion regarding the legal effects of unilateral declarations. Indeed, until this case, the ICJ itself had repeatedly taken the position that a state against which a rule of international law is asserted must be shown to have acquiesced in that rule, either by a showing that the rule is one of general international law, a treaty commitment of that state, or a rule acquiesced in by definite, consistent conduct by that state.⁸⁹ But until the ICJ delivered its Judgment in the *Nuclear Tests* cases, there was no reason in precedent or doctrine to suppose that the rule pronounced in the Judgment was part of general international law or any treaty to which France has adhered. Assuming the rule to have been in the process of formation, perhaps part of a growing *opinio juris*, it would seem inconsistent with the prior pronouncements of the Court to apply the rule to France in the absence of some indication that France had accepted the rule as law.

But in the only recent precedent, the Egyptian declaration of 1957, France had publicly taken the position that a unilateral declaration was *not* binding on the declarant and that it could be revoked by the declarant. There is no evidence that this position, which might even be considered a unilateral declaration by France taking a firm position on a matter of law and with an intent to be bound, was ever modified by France. Accordingly, it seems doubtful, taking the Court's own position in the *Nuclear Tests* cases as a correct statement of law, that France could have applied that law to any other state making a unilateral declaration. There seems to be something fundamentally wrong with applying a rule to the one state that has clearly signalled that it rejected that rule, when applying the rule would make it impossible for that very state to use it against states accepting the rule.

The evidence in the case of the Egyptian declaration of 1957 is that even those states arguing in support of holding that a unilateral declaration creates an irrevocable obligation believed that some manifestation of the intention to be bound must exist beyond the mere assertion of the declarant state. Not only did Egypt assert that the instrument was binding, but it also registered the declaration with the UN Secretary-General under Article 102 of the UN Charter. Without resolving the issue whether a treaty, or other international document sought to be applied as a treaty, must be registered before it can be invoked before an organ of the United Nations (such as the ICJ, which is the principal judicial

⁸⁹ Cf. The North Sea Continental Shelf cases, *supra* note 78, at 25 (para. 28):

As regards these contentions [that the Federal Republic of Germany assumed by conduct, public statements, and proclamations the obligations of a conventional regime not adhered to formally by Germany], it is clear that only a very definite, very consistent course of conduct on the part of a State in the situation of the Federal Republic could justify the Court in upholding them.

The Court did not find such conduct to exist.



organ of the United Nations),⁹⁰ surely it is evidence that France did *not* intend its unilateral declarations to be binding, and that it did not follow the Egyptian precedent of submitting the undertaking for registration by the Secretary-General.

France's choice of means to deliver its statements does not evidence the intent to be bound. The only statement made in diplomatic correspondence was the carefully qualified statement (number two in the listing above) to New Zealand which quoted a previous policy statement that indicated a present, but not a future, intent (number one) and added a qualification ("in the normal course of events"). It must be a source of some disquiet to other statesmen to know that a statement delivered to a National Assembly outlining an elected government's program may be held to be binding internationally (number three); that a statement given by the Defense Minister in a television interview may be held to be binding internationally (number four); and that a statement by a Defense Minister at a press conference outlining policy for only one year might be held binding at all, much less binding for the indefinite future (number six). Such statements are surely not binding in municipal law, however important they may be as a matter of internal politics; and the statements were addressed to domestic French audiences. How they evidenced an intent to bind France as a matter of international law is not clear at all. The one unqualified statement issued to an international forum by the French Foreign Minister (number five) was given before the UN General Assembly, which has not been normally considered a forum in which binding commitments are made. In giving the statement, France gave no sign that it had any special intention which would negate that presumption.

What of the words of the declarations themselves?

The communique of June 8, 1974 speaks of future underground tests but does not indicate that there will never be any more atmospheric tests in the South Pacific area.

The Note of July 10 repeats the communique of June 8 and adds a qualification ("in the normal course of events") with regard to the new assurance that there will be no further atmospheric tests.

The statement of July 25 seems to be evidence that the entire French posture regarding nuclear testing was one of policy, not law. The President announced a modification of prior French policy regarding atmospheric tests. If the prior policy could be modified, it seems obvious that the President was assuming that his new policy could also be modified.

The statement of August 16, 1974 merely says that the government "had done its best" to ensure that there would be no more tests. There is no

⁹⁰ Article 92 of the UN Charter declares the Court to be such an organ. Article 102(2) provides:

No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

commitment but merely a statement of fact which seems irrelevant to the question of an intention to enter into a commitment.

The statement of September 25 is an assertion regarding the immediate future program of French testing and seems to contain no word confining later French programs to underground areas. Indeed, it seems to be an assertion that underground testing programs will be accelerated with no word as to what programs, if any, might be contemplated for the period after the next round of underground tests has been completed.

Finally, the statement of October 11, seems carefully restricted to the 1975 program. If it is evidence of a French intention to be bound, it was an intention to be bound for 1975 only.

Can the sum of zeros be more than zero? Is it not clear from these statements that the French intended *not* to be bound to anything more than a short-term self-abstinence from atmospheric testing? The ICJ Judgment has certainly not supplied any realistic argument to support its reading of the French intentions to cover the resumption of atmospheric testing that concerned Australia and New Zealand as a possibility for 1976 or later.⁹¹

IV

SOME FURTHER IMPLICATIONS

It would appear that the ICJ has found a new rule of international law saddling a state with apparently nonrevocable treaty-like commitments *erga omnes*, arising out of public unilateral declarations with a presumed intention to be bound and nothing more. Whence came the Court's conviction that such unilateral declarations are binding? Not from any treaty to which France is a party, thus not from Article 38(1)(a) of the Statute of the Court; not from any known international custom as evidence of a practice accepted as law, thus not from Article 38(1)(b) of the Statute; not from any principle accepted by Anglo-American courts or commentators or from "any general principles of law," thus not from Article 38(1)(c) of the Statute; and, indeed, not from the unequivocal writings of any publicists or judicial decisions that have focused squarely on the question, thus not from Article 38(1)(d) of the Statute.⁹² Thus, aside from its inherent unpersuasiveness and the language of Article 59 of the Statute of the Court which restricts the binding effect of an ICJ decision

⁹¹ Cf. Dissenting Opinion of Judge De Castro in the *Nuclear Tests* cases 372 at 375 (Australia v. France).

⁹² The only publicists of note who have taken the position adopted by the Court are Suy, whose precedents do not support his position, and whose principal citation to Sir Gerald Fitzmaurice seems to have mistaken Fitzmaurice's evolving views, and Judge Alfaro in a Separate Opinion, which in context appears idiosyncratic, which was specifically rejected by at least two other judges in the same court, and which was clearly overborne by a large majority in the ICJ seven years later. Many other publicists have disagreed, as has been seen, and most who have appeared to address the question turned out on closer analysis to have had other things in mind.

to the particular parties and case before the court, the pronouncement of the Court appears to have been *ultra vires*: The ICJ is not empowered by Article 38(1) of its Statute to decide in accordance with international law any disputes submitted to it using other sources of law than the ones enumerated. Thus a serious question is raised as to whether the substance of the Judgment relating to the binding force of the French unilateral declarations is binding on France at all under Article 94(1) of the UN Charter,⁹³ even assuming the Judgment is a "decision" and is correct in all other aspects, including those aspects relating to jurisdiction.

Since the Judgment of the ICJ was a refusal to decide on the merits of the case, it is possible to argue that there was no decision in the sense of Article 94(1) and that not even Article 59 of the Statute of the Court applies. In that case, the Judgment may be considered to be a mere expression of opinion to be weighed on its merits with other expressions of publicist's opinions. The Court's having given no coherent reason for its opinion as to the legal force of unilateral declarations of intention, that opinion can hardly be viewed as having a major impact on the development of international law.

But the fact that the Judgment of the Court is unpersuasive as to the asserted rule on which it is based and probably not binding on the parties to the case does not exhaust the implications of the Court's action. These days, when the Court's docket is already empty, can statesmen be expected to refer to the Court real cases in which a determination or application of rules of international law would be helpful to settle real problems? The assertion by the Court of a doubtful rule of international law that seems to indicate some reluctance on the part of the Court to grapple with real issues can hardly encourage confidence.⁹⁴ Not only is the real dispute still unresolved, but an unexpected pronouncement of a rule that seems unsupportable by normal legal logic appears to have resulted from the submission of this case. A statesman with large public responsibilities is not likely to be willing to submit a significant decision to the apparent caprice of a third party. A tribunal that has exceeded its own authority in searching for a rule of law that enables it to avoid answering the question as presented and then found such a rule to exist in the absence of argument, precedent, or stated logic is very likely to seem capricious to a statesman. The implications to the United States, with its long history of reluctance to submit to the jurisdiction of the Court, do not need further elaboration here. Lest it be supposed that too much is being made of this single case to point out a penchant of the ICJ to combine unwillingness to pronounce on the issues argued before it and to make unsupportable pronouncements of supposed rules of international

⁹³ "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

⁹⁴ Cf. Sur, *Les Affaires des Essais Nucléaires* . . . , 80 REV. GÉN. DE DR. INT. PUBLIC 972 (1975).

law, it should be pointed out that this trend has already been noticed by other observers.⁹⁵

Finally, as to the merits of an "anti-inconsistency rule" applied to unilateral declarations of intention, the supporters of such a rule⁹⁶ must consider whether its cost is not too heavy for the international order to bear.

If policy pronouncements or expressions of intention can be construed to be irrevocable without detrimental reliance or any other formality beyond the possibly transitory intention of the declarant state, the result is hardly likely to be greater adherence of states to their pronouncements. Realistically, it is much more likely to result in greater disregard by states of the asserted dictates of the law and greater reluctance by states to publish their intentions. How can a state be certain now that a clearly labeled policy, issued to its own internal press or a political sounding-board like the UN General Assembly, as a signal to other states of its position on a controversial matter and an invitation to discuss matters further, will not end the negotiation sought? Why should a second state negotiate when it perceives that the ICJ may be willing to interpret the policy statement of a limited concession to public opinion as a binding obligation *erga omnes*?

Is it wise policy to discourage states from publishing their intentions, however transitory? If a published intention leads a second state to change a position to its detriment, principles of estoppel may come into play to avoid the injustice that might otherwise result; but to make an expressed intention irrevocable without reliance cannot encourage the sort of open discussion of positions and issues that leads to stability in international affairs. Nor can it lead to a respect for international obligations to regard them as created so easily. If, instead of merely announcing a new policy, a state feels bound by rules of international law to continue to pursue an outdated policy on which no other state has relied to its legal detriment, we are all losers. If an exception is found as large as the rule, which seems the likely legal development for people concerned with the integrity of the ICJ and the legal order, then the legal order is itself degraded by a truth of uncertainty underlying a specious certainty. It is distressing to find the ICJ itself playing a role in this evolution.

⁹⁵ An analysis of the evolution of the Court from a rather conservative, positivist-oriented tribunal concerned with the stability of the international legal order to a "major-purpose-oriented" tribunal with little regard for the traditions of the law, see GROSS (ed.), *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* Ch. 18 (1976).

⁹⁶ Recent publicists approving the substance of the rule include Carbone, *Promise in International Law: A Confirmation of its Binding Force*, 1 *THE ITALIAN YEARBOOK OF INTERNATIONAL LAW* 166 (1975), and works cited in notes 4-8 therein; Franck, *Word Made Law* . . . 69 *AJIL* 612 (1975); McWhinney, *International Law-Making and the Judicial Process* . . . 3 *SYRACUSE J. OF INT'L L. AND COMMERCE* 9 (1975).

THE DISPUTE BETWEEN GREECE AND TURKEY CONCERNING THE CONTINENTAL SHELF IN THE AEGEAN

By Leo Gross *

I.

INTRODUCTION

On August 10, 1976, Greece addressed a communication to the President of the Security Council requesting an urgent meeting of the Council on the ground that "following recent repeated flagrant violations by Turkey of the sovereign rights of Greece in the continental shelf in the Aegean, a dangerous situation has been created threatening international peace and security."¹ On the same day, by unilateral application, Greece instituted proceedings in the International Court of Justice against Turkey in "a dispute concerning the delimitation of the continental shelf appertaining to Greece and Turkey in the Aegean Sea, and concerning the respective legal rights of those States to explore and exploit the continental shelf of the Aegean."² Also on the same day Greece filed a request for interim measures of protection asking the Court to direct that both Greece and Turkey

(1) unless with consent of each other and pending the final judgment of the Court in this case, refrain from all exploration activity or any scientific research, with respect to the continental shelf areas within which Turkey has granted such licenses or permits or adjacent to the Islands, or otherwise in dispute in the present case,³

(2) refrain from taking further military measures or actions which may endanger their peaceful relations.⁴

While this procedure—a simultaneous appeal to the most political of the political organs of the United Nations, the Security Council, and its principal judicial organ, the Court—may strike one as a bit unusual, it may have been useful, as the outcome shows, to seek, as Judges Lachs and Elias put it, "both legal and political relief."⁵ Greece was successful in obtaining some relief from the Security Council in paragraphs 1 and 2

* Of the Board of Editors. I wish to thank Mr. Timothy P. Ireland for his research assistance.

¹ UN Doc. S/12167.

² Aegean Sea Continental Shelf, Interim Protection, Order of 11 Sept. 1976. [1976] ICJ REP. 3 (hereinafter cited as [1976] REP.), 15 ILM 985 (1976).

³ In the French version the passage is clearer: "... la Turquie a accordé des concessions ou des permis, ou qui sont adjacentes aux îles, ou qui se trouvent à d'autres égards en litige dans la présente espèce."

⁴ [1976] REP at 4-5.

⁵ *Id.* at 19 and 27. Judge Elias thought this case was "probably unique" from this angle. *Id.*

of Resolution 395(1976) although it failed to receive from the Court satisfaction for its request for interim measures. Turkey was successful before the Court in so far as the denial of the Greek request was concerned though it failed to persuade the Court that the Greek Application was "premature," that the Court lacked jurisdiction, and that, for this reason, the case should be removed from the Court's list.⁶ Turkey was also partly successful in the Council inasmuch as paragraph 3 of Resolution 395(1976) called for resumption of direct negotiations and paragraph 4 invited both governments "to take into account the contribution that appropriate judicial means, in particular the International Court of Justice, are qualified to make to the settlement of any remaining legal differences which they may identify in connection with their present dispute." This could be interpreted as an indication that the Council considered, as did Turkey, that the Greek Application was premature and that in any event the Court should be seised, as contended by Turkey in the Council as well as in the preceding diplomatic exchanges with Greece, by means of a special agreement rather than, as it was, by unilateral application.⁷

Paragraphs 3 and 4 of Resolution 395(1976) raise an issue of principle, namely that of the relations between the Security Council and the Court which will be discussed below. But it may be useful first to survey briefly some substantive aspects of the Greco-Turkish dispute.

It appears from documents submitted to the Council and the Court that the dispute relates to the shelf of the two countries and more particularly, as stated in the Greek submissions to the Court, to the shelf appertaining to Greek islands in the Aegean.⁸ In its first submission to the Court,

⁶ *Id.* at 5, paras. 8 and 13, paras. 45 and 46.

⁷ In the Council the Turkish representative, referring to this, said:

The position of the Turkish Government on this matter has always been clear and consistent. If it becomes necessary, Turkey does not exclude recourse to the International Court of Justice to settle certain relevant aspects of the problem, but maintains that the dispute should first be negotiated between the two countries. Those aspects of the problem that cannot be resolved through negotiations conducted meaningfully and in good faith could then and only then, be referred to the International Court of Justice or to any other legal or judicial instance. It is obvious that such a referral can only be made jointly.

UN Doc. S/PV.1950, Aug. 13, 1976, at 12. The representative quoted the following passage from the *Continental Shelf* case on the meaning of "meaningful" negotiations:

The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement, they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.

[1969] ICJ REP. 3, at 47, para. 85(a). The text in UN Doc. S/PV.1950 is not quite accurate. For earlier evidence of Turkey's position, see Notes Verbales from the Turkish Ministry of Foreign Affairs to the Greek Embassy in Ankara of Feb. 6, 1975, Sept. 30, 1975, and Nov. 18, 1975 in UN Doc. S/12173, Aug. 12, 1976, Annexes II and III.

⁸ The islands are listed in the Greek Application at 4, 5, and 10 and in [1976] REP. 6, para. 15(i).

Greece claims "that these islands . . . as part of the territory of Greece, are entitled to the portion of the continental shelf which appertains to them according to the applicable principles and rules of international law."⁹ It is in the shelf area of these islands, though outside their territorial waters, that since November 1, 1973, Turkey has granted to the Turkish State Petroleum Company (TPAO) exploration permits which Greece claimed "encroached upon the continental shelf" of the islands.¹⁰ In the Turkish view, "at the present time Greece possesses no delimited sovereign rights in the Aegean beyond its own territorial waters."¹¹ Turkey also contended that whereas since the 1960's Greece had granted numerous exploration licenses and drilled for oil in the Aegean "outside Greek territorial waters," Turkey had "started its research activities on the natural prolongation of Anatolian peninsula in 1974, 11 years later than Greece."¹²

Although in its second submission Greece asked the Court to declare "what is the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to Greece and Turkey in the Aegean Sea in accordance with the principles and rules of international law which the Court shall determine to be applicable,"¹³ it also affirmed: "The dispute is confined to the continental shelf adjacent to the said Islands and does not concern any other part of the Aegean Sea or seabed thereof."¹⁴ While both Governments based their views on international law,¹⁵ the

⁹ *Id.* 4, para. 1(i).

¹⁰ *Id.* 7, para. 16, and Greek Application at 4.

¹¹ The Turkish representative in the Security Council, UN Doc. S/PV.1950, Aug. 13, 1976, at 7-10.

¹² Letter from the permanent representative of Turkey to the Secretary-General of the UN of Aug. 18, 1976, UN Doc. S/12182.

¹³ [1976] REP. at 4, para. 1(ii). Submissions (iii) to (vi) are consequential: the Court is asked to adjudge that Greece has exclusive rights in the shelf, that Turkey is not entitled to undertake any activities without the consent of Greece, that Turkish activities constitute infringements of Greek sovereign rights, and finally that Turkey shall not continue its activities.

¹⁴ Greek Application, 18, para. 31. Islands are listed in para. 29. It may be that the position of Greece was motivated by its reservation to the accession to the General Act for the Pacific Settlement of International Disputes of September 28, 1928. This excluded certain disputes "in particular disputes relating to its rights of sovereignty over its ports and lines of communications." [1976] REP. 8, para. 19. Turkey's position was that the General Act was "no longer a treaty in force between Greece and Turkey" and alternatively that the dispute fell within the terms of the reservation. *Ibid.* This point is elaborated in the Observations of the Government of Turkey on the Request by the Government of Greece for Provisional Measures of Protection, transmitted to the Court on August 25, 1976, at 8 and 10 ff. The Court found that "it is not necessary for the Court to reach a final conclusion at this stage of the proceedings on the questions thus raised concerning the application of the 1928 Act as between Greece and Turkey . . ." [1976] REP. 8, para. 21.

¹⁵ Greece could invoke Article 1 of the 1968 Geneva Convention on the Continental Shelf which defines in Article 1(b) the term "continental shelf" as referring "to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands." 15 UST 471; TIAS No. 5578; 499 UNTS 311, 52 AJIL 858 (1958).

Turkish Government, as understood by Greece, maintained that some of the islands "could not have a continental shelf, the reason being either that those islands constituted mere elevations (protuberances) on what Turkey considered to be its own continental shelf, or that a long time ago they belonged geologically to the continent of Asia."¹⁶ This, in rough outline, is the substance of the dispute which provides the background for the tension that came before the Security Council.

II.

THE APPEAL OF GREECE TO THE SECURITY COUNCIL

As indicated earlier¹⁷ the Greek appeal to the Security Council was based on the dangerous situation created by the "seismological explorations" conducted since August 6, 1976 by Turkey "with the vessel *Sismik-I* on the Aegean continental shelf, which Greece considers her own."¹⁸ Greece, invoking Article 35 of the Charter, appealed to the Council "in order to avert the danger of disturbing the peace, which is being seriously threatened."¹⁹ In an Explanatory Memorandum Greece referred to "the already very serious Greco-Turkish dispute, the Turkish naval and air manoeuvres preceding or accompanying the movements of the vessel *Sismik-I*, the presence and concentration of Turkish naval and air units 'covering' the activities of that vessel, the precautions inevitably taken by the Greek Government, and Turkey's insistence on continuing the tests" as elements "creating a situation of confrontation the prolongation of which is likely to endanger the maintenance of international peace and security."²⁰ In the Council, Greece maintained its stand and asked the Council to let Turkey know "that it must suspend its provocative acts. The United Nations was not in time to stop the tragedy of Cyprus. It can now prevent a new tragedy in the Aegean."²¹

Turkey, although not a party to the Convention, could rely on Article 6, as interpreted by the Court in the *Continental Shelf* case, which, in cases of both coasts which are opposite each other and coasts adjacent to the territories of two adjacent states, stressed the principle that delimitation shall be determined by agreement and that "special circumstances" may require consideration. See Turkish Note Verbale, Feb. 27, 1974, in Greek Application, at 37-39, referring to [1969] ICJ REP. 31, paras. 43 and 44 and 47, para. 85.

¹⁶ Greek Note Verbale, March 22, 1976, in Greek Application, at 81. As understood by Greece, Turkey denied the applicability of the median line to the delimitation of the shelf in the Aegean between opposite states, also on the ground that there was "a discontinuity in the seabed." Statement by the Greek Delegation at the Meeting of Experts of the Governments of Greece and Turkey in Berne on June 19 and 20, 1976, in Greek Application, at 84-86.

¹⁷ *Supra*, p. 31.

¹⁸ UN Doc. S/12168, Aug. 10, 1976, at 1.

¹⁹ *Id.* at 3, and UN Doc. S/PV.1949, Aug. 12, 1976, at 6.

²⁰ UN Doc. S/12173, Aug. 12, 1976, at 5. The movements of *Sismik-I* are detailed in this document at 2 as well as in its Annex I, at 2-3.

²¹ UN Doc. S/PV.1949, Aug. 12, 1976, at 16. The Greek representative summarized the substantive dispute at 6-15.

Turkey responded by restating its position with respect to the substantive dispute, namely that in the absence of an agreed delimitation of the continental shelf "the Greek claim of violation of the Greek sovereign rights is completely unfounded" and "that *MTA Sismik-I* is carrying out its researches outside the territorial waters in the Aegean where the Continental Shelf is yet to be delimited."²² Turkey also claimed "that since August 6, 1976, the vessel was under the harassment of vessels and aircraft belonging to the Greek Navy and Air Force."²³ In addition, Turkey complained that Greece, in violation of the Treaty of Lausanne of July 24, 1923, and the Treaty of Peace with Italy of February 10, 1947, had militarized the islands which pursuant to these treaties were to be demilitarized.²⁴ In the Council Turkey maintained its position and also recalled that "a Greek vessel named *Nautilus* is at this very moment conducting very similar activities in a neighboring region" and "that at the present time Greece possesses no delimited sovereign rights in the Aegean beyond its own territorial waters."²⁵ Turkey hoped that the Council would invite Greece to enter into "meaningful negotiations" and "that the Council will examine Greece's flagrant violations of its international obligations under the treaty regarding the demilitarization of the islands in the eastern Aegean and will take the steps required to put an end to a threat to peace and security in that region."²⁶

The Security Council did not attempt to assess blame on one side or the other for the situation in the Aegean nor did it attempt to deal directly with the substance of the dispute,²⁷ although it made a recommendation with respect to the procedure which it considered appropriate. After consultations outside the Council, France, Italy, the United Kingdom, and the United States, submitted on August 24, 1976 a draft resolution (UN Doc. S/12187) which would, if adopted, "provide a framework in which the dispute between Greece and Turkey can be resolved."²⁸ As there was

²² UN Doc. S/12172, Aug. 11, 1976, Annex I and Annex II, at 1.

²³ *Id.* Annex II, at 2. Turkey submitted "a list of illustrative nature of the harassment and intimidation actions" by Greece. UN Doc. S/12175, Aug. 13, 1976.

²⁴ UN Doc. S/12176, Aug. 13, 1976. Turkish charges of Greek explorations in the Aegean "outside the territorial waters" of the specified islands are detailed in UN Doc. S/12182, Aug. 20, 1976.

²⁵ UN Doc. S/PV.1950, at 6, 7-10. The representative of Turkey also alluded to "illegal acts" of Greece "aimed at transforming the international air space of the Aegean into national Greek air space, thus depriving Turkey and other countries of their inherent and traditionally established rights to use the international air space over the Aegean." *Id.* at 17.

²⁶ *Id.* at 21. Some details on the violations of the treaties of 1923 and 1947 will be found *id.* at 16. Concerning "meaningful negotiations," see *supra* note 7.

²⁷ The statement by the representative of the United Kingdom, UN Doc. S/PV.1953, Aug. 25, 1976, at 8. The representative of the United States did not believe that the Council was the place "to analyze such complex issues of international law" as those relating to the continental shelf which "are among the most sensitive in the entire field of international law." *Id.* at 14-15.

²⁸ UN Doc. S/PV.1953, Aug. 25, 1976, at 8.

no unanimity in its favor, on the one hand, and no objection on the other, the President declared the draft resolution adopted by consensus.²⁹

Resolution 395(1976), as is so often the case with Security Council resolutions, does not indicate on which article of the Charter it is based. Members of the Council expressed different views. France, one of the sponsors, referring to paragraph 4 of the resolution, mentioned specifically Article 36(3).³⁰ Panama referred to Article 33(1) and (2), Tanzania and Japan referred to Article 33 of the Charter.³¹

Clearly, as indicated earlier, Resolution 395(1976) has two parts: In the first part, paragraphs 1 and 2, the Council calls, as the United Kingdom representative put it, "for restraint on both sides and must then go on to urge them to do everything in their power to reduce the present tensions."³² Turkey, which had considered the Greek appeal to the Council "completely pointless," put an interpretation on this part that was most favorable to itself, saying that the Council "did not accept the contention that the Turkish research vessel, 'Sismik-I', in its activities, had infringed on the sovereign rights of any country."³³ In the style which usually prevails in such matters in the United Nations, one could add that the Council had not rejected the Greek contention. In any event, Greece appeared satisfied,³⁴ and, as far as one knows, the tension was defused. As the French representative put it: "Since fever does not make for a clear head, it must first be reduced."³⁵

²⁹ *Id.* 47. Pakistan objected to paragraph 4 of the draft resolution and to the unilateral application of Greece to the Court and hoped that Greece "will now find it possible to reconsider." *Id.* 43. Libya indicated that if a vote were taken, it would abstain. *Id.* 47. As adopted, the resolution was numbered 395(1976).

³⁰ The French representative stated that the authors of paragraph 4 "had a great deal of trouble with the two parties regarding it" and went on to say:

The Charter, in Chapter VI, lists the various peaceful ways of settling disputes. Article 36(3) specifically singles out the specific role to be played by the International Court of Justice in dealing with legal disputes, which is clearly what the limitation of the continental shelf is. What we have tried to recall in the last operative paragraph of our draft, which is the logical outcome of the preceding paragraph, is that when the parties, in their negotiations, encounter problems which they are unable to resolve, they have available to them the judicial channels laid down in the Charter—and, in the case of the International Court of Justice at The Hague—those enunciated in the Court's Statute. This reminder seems reasonable to us and in accordance with the position previously taken by both Greece and Turkey.

UN Doc. S/PV.1953, at 21.

³¹ *Id.* 24-25, 26, 51, and 52.

³² *Id.* 7. The last preambular and the first two operative paragraphs read as follows:

Conscious of the need for the parties both to respect each other's international rights and obligations and to avoid any incident which might lead to the aggravation of the situation and which, consequently, might compromise their efforts towards a peaceful solution,

1. Appeals to the Governments of Greece and Turkey to exercise the utmost restraint in the present situation;

2. Urges the Governments of Greece and Turkey to do everything in their power to reduce the present tensions in the area so that the negotiating process may be facilitated;

³³ *Id.* 53-55.

³⁴ *Id.* 57.

³⁵ *Id.* 18.

In paragraphs 3 and 4, Resolution 395(1976) addresses itself to the legal aspects of the dispute. As indicated earlier, this part of the resolution appears to support partly the Turkish stand, although it was also acceptable to Greece.³⁶ Turkey objected to paragraph 4 saying that "the core of the resolution can be found in operative paragraph 3. While we feel that this paragraph is in accord with our policy, we do not consider that we are bound by any other provision that could be construed as constituting any precondition or constraint, nor could we accept any provision that would be likely to prejudge the process of negotiation or its outcome or that might involve any unilateral recourse to a judicial body."³⁷

It has been suggested that paragraphs 3 and 4 raise a question of principle, namely the propriety, to put it no higher, of the Council making a recommendation with regard to the method of settling a dispute when the same dispute was sub judice in the International Court of Justice. It may be doubtful whether this was a situation which comes under the technical rubric of *lis pendens*.³⁸ In any event, although the parties as well as all the members of the Council were aware that the legal aspects of the dispute had been brought before the Court by the application of Greece, no objection was raised in the Council against paragraph 3 and, more particularly, against paragraph 4 of Resolution 395(1976). On an earlier occasion, in 1960 in connection with the *South West Africa* cases, South Africa raised the issue of sub judice in the General Assembly without avail. In the view of some commentators, neither the principle of *lis pendens* nor the cognate sub judice have become general principles of law or part of the law of the United Nations.³⁹ Indeed it has been said that "while there is sufficient experience in the United Nations to indicate that *litispence* may constitute a temporary obstacle to effective political treatment, it is now clear that the fact that a dispute is simultaneously

³⁶ See *supra*, p. 32 at note 7. For the Greek statement, see UN Doc. S/PV.1953, at 57. The text of paras. 3 and 4 is as follows:

3. *Calls on* the Governments of Greece and Turkey to resume direct negotiations over their differences and appeals to them to do everything within their power to ensure that these result in mutually acceptable solutions;

4. *Invites* the Governments of Greece and Turkey in this respect to continue to take into account the contribution that appropriate judicial means, in particular the International Court of Justice, are qualified to make to the settlement of any remaining legal differences which they may identify in connexion with their present dispute.

³⁷ UN Doc. S/PV.1953, at 56. The Turkish representative went on to say:

It should also be borne in mind that Turkey has not recognized the jurisdiction of the International Court of Justice as binding. Furthermore, it is undeniable that the resumption of negotiations implies that no unilateral action should be undertaken that would be in flagrant contradiction with the concept of negotiations as I have just defined it.

Id. 57.

³⁸ Concerning this, see Ciobanu, *Litispence between the International Court of Justice and the Political Organs of the United Nations*, in L. GROSS (ed.), 1 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 209-75, esp. 219-26 (1976) (hereinafter cited as GROSS). See also S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 83-87, 516, 752, n.2 (1965).

³⁹ ROSENNE, *supra* note 38, at 752, 851; Ciobanu, *supra* note 38, at 225-26. GROSS 120 REC. DES COURS 313-439, at 329 (I, 1967).

being dealt with by the General Assembly and by the Court is not in itself regarded in either organ as a bar to its further action."⁴⁰

Yet it does not seem wholly satisfactory to let the matter rest there. Article 36(2) refers to methods for the settlement of disputes and the Council "should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties." In this case the parties have been engaged in negotiations for a substantial period of time, and no matter what the preferred meaning of this clause may be⁴¹ the appeal in paragraph 3 of Resolution 395(1976) does not appear to be helpful in the absence of any guidance concerning the applicable principles of international law. To be sure, Greece did not seek such guidance from the Council but from the Court. There is no doubt that it was quite proper for the Council to deal with the tension which had arisen in the Aegean but it is another thing altogether for the Council to make a recommendation which, if it has any meaning at all, invites certainly Greece, and to an extent Turkey, to withdraw the case from the Court.⁴²

If doubt is possible about the real intent of the Council in connection with paragraph 3, no doubt seems possible with respect to paragraph 4. It may be recalled that France in this context referred specifically to Article 36(3) of the Charter.⁴³ As is well known, the Council has only once, in the *Corfu Channel* case, adopted a resolution under Article 36(3).⁴⁴ Though practice is therefore extremely scarce, there can be no doubt about the intent and purpose of this clause: the Council should, as a general rule, encourage the parties to take legal disputes to the Court and not to discourage them from so doing. But "discourage" is precisely, in the specific circumstances of the Greco-Turkish dispute, what the Council appears to have done. As the dispute was pending before the Court and, as it included "remaining legal differences" which the parties have been unable to resolve in bilateral negotiations, what could possibly be the intent of the Council unless it was to invite the parties to go back

⁴⁰ ROSENNE, *supra* note 38, at 87. Rosenne continues as follows:

This is illustrative of the extent of the integration with the Organization and its work of the Court as a principal organ and the principal judicial organ of the United Nations. It well illustrates the functional parallelism of two principal organs of the United Nations, each of which has competence, under the combined Charter and Statute, to deal with the same "dispute".

⁴¹ Thus, Ciobanu concludes that

the *travaux préparatoires* of the San Francisco Conference seem to indicate that it was not the intent of the conferees to restrict the jurisdiction of the Security Council to deal with any dispute falling under its jurisdiction for the sole reason that other means and procedures for its peaceful settlement (among them the judicial settlement by the International Court of Justice) have been adopted by the parties.

Supra note 38, at 222.

⁴² The inclusion of Turkey is made with some diffidence but it may be justified by the fact that on August 25, 1976, the day on which Resolution 395 (1976) was adopted by the Council, Turkey transmitted to the Registrar of the Court its Observations on the Request of Greece for Provisional Measures of Protection. The Observations were dated August 10, 1976.

⁴³ *Supra*, p. 36, at note 30.

⁴⁴ Resolution 19(1947), Feb. 27, 1947, 2 SCOR, RES. & DEC. 3 (1947).

to square one and/or invite Greece to withdraw its application so that negotiations could start *ab novo* without the sword of Damocles—the Court—hanging over their heads? In casting the Court in this role, the Council has not contributed to the enhancement of the stature of the Court or the strengthening of its precarious position. Even if from the constitutional point of view, the Council acted within its rights, a matter on which there is, in the present submission, room for doubt, the Council showed a remarkable lack of respect and sense of propriety for the Court in the advice which it offered to the parties. It is odd, indeed, for the Security Council to criticize a state, even though by indirection,⁴⁵ for resorting to the Court on what it believed to be sufficient legal grounds and after extensive diplomatic efforts have proved fruitless in the search for the solution of legal problems of vital interest to it as well as to the other side. Greece, in appealing to the Court, has taken a step in the direction of depoliticizing the dispute; the Security Council has taken a step in repoliticizing it, the effect of which remains to be seen.⁴⁶

III.

THE APPEAL OF GREECE TO THE INTERNATIONAL COURT OF JUSTICE

As stated earlier, Greece submitted an Application to the Court on August 10, 1976 in the dispute with Turkey concerning the continental shelf in the Aegean. At the same time Greece requested interim measures of protection pending judgment on the merits. Only this request will be

⁴⁵ It is impossible not to see a veiled criticism of Greece in the remarks of the United States representative:

I believe it is also clear that both parties recognize the potentially valuable role of the International Court of Justice to consider matters which remain unresolved after negotiations. The important thing is that the parties find a basis through direct contacts between them for whatever combination of direct talks and supporting adjudication may be necessary to achieve the peaceful settlement that my Government is confident both Governments seek.

UN Doc. S/PV.1953, at 17.

⁴⁶ It may be pertinent to draw attention to G.A. Resolution 3232(XXIX) of November 12, 1974 entitled "Review of the role of the International Court of Justice" which in a general way was designed to encourage states and UN organs to make greater use of the Court. 29 GAOR, Supp. (No. 31) 141, UN Doc. A/9631 (1974). In paragraph 6 the Assembly "reaffirms that recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be regarded as an unfriendly act." "Referral" in this context cannot mean anything but seising the Court by means of a unilateral application. It is difficult to escape the impression that both Turkey and the Security Council tended to regard the Greek Application as an unfriendly act which they should not have done had they heeded the Assembly resolution. For a recommendation of diplomatic and judicial procedures, see G.A. Res. 1497(XV), October 31, 1960, "The status of the German-speaking element in the Province of Bolzano (Bozen); implementation of the Paris agreement of 5 September 1946." 15 GAOR, Supp. (No. 16) 5, UN Doc. A/4684 (1960). In that case, however, no judicial proceedings were pending before the Court. In the Special Political Committee reference was made to Article 36(3) of the Charter by the representatives of Paraguay, Liberia, and Ireland. 15 GAOR, Spec. Pol. C. at 19, 26, and 47 (1960).

considered here and it seems convenient to separate the action of the Court with respect to this request from the question of jurisdiction.

A. Request for Interim Measures of Protection

The Greek request had two objectives: to enjoin both Greece and Turkey (a) from conducting further exploration or research in the contested areas and (b) from taking measures likely to endanger their peaceful relations.⁴⁷ The request was based on Article 33 of the General Act of 1928 for the Pacific Settlement of International Disputes, on Article 41 of the Statute of the Court, and Article 66 of the Court's Rules of Procedure.⁴⁸ Although the applicability of the General Act was contested by Turkey because it was no longer in force and if it was, the dispute was excluded by the Greek reservation,⁴⁹ the Court found it unnecessary "to reach a final conclusion at this stage of the proceedings" on the question and decided to examine the Greek request "only in the context of Article 41 of the Statute."⁵⁰

The Court then defined its powers under Article 41:

Whereas the power of the Court to indicate interim measures under Article 41 of the Statute presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the matters in issue before the Court.⁵¹

The Court has used similar language on other occasions⁵² and while the principles set out in the abstract may be clear enough, there may be problems when they are applied to particular situations. In the present case the Court examined in particular whether the concessions granted and the seismic explorations undertaken by Turkey were in the nature of causing or threatening an irreparable prejudice to the rights claimed by Greece as its own. The Court found that these activities cannot "be creative of new rights or deprive the other State of any rights to which in law it may be entitled."⁵³ Turning to the seismic explorations conducted by Turkey, the Court was of the opinion that their illegality depended upon a prior finding that they were conducted in an area which

⁴⁷ See *supra*, p. 31, at notes 3 and 4 for text of the Greek request.

⁴⁸ [1976] REP. 4, para. 2. It is not clear whether provisional measures indicated by the Court under Article 41 of the Statute are binding. See *Conclusions* in GROSS, *supra* note 38, at 739 and H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 110-13, 253-54 (1958). Therefore the invocation of Article 33(1) of the General Act had the object of eliminating any doubt on this score for it provides: "The parties to the dispute shall be bound to accept such measures."

⁴⁹ [1976] REP. 8, para. 19. See *supra* note 14.

⁵⁰ *Id.* 8, para. 21.

⁵¹ *Id.* 9, para. 25.

⁵² Fisheries Jurisdiction case (United Kingdom v. Iceland) Interim Protection, Order of Aug. 17, 1972, [1972] ICJ REP. 12, at 16, para. 21, and Nuclear Tests case (Australia v. France), Interim Protection, Order of June 22, 1973, [1973] REP. 99, at 103, para. 20.

⁵³ [1976] REP. 10, para. 29.

the Court, in proceedings on the merits, may find to appertain to Greece.⁵⁴ The Court appears to have broken new ground, however, when it applied the test of "irreparable prejudice" as a condition for the application of Article 41. The Court stated that a prejudice is not irreparable if it is "capable of reparation by appropriate means,"⁵⁵ that in the present case there was no threat of irreparable injury, and therefore no need or justification for applying Article 41.

The Court seems to have taken the cue offered it by Turkey which, in its Observations, argued that interim measures may be indicated when one of these two situations arises:

either the damage that is caused to one party is irreparable in the sense that it cannot in the future be remedied by the payment of a sum of money; or the execution of the eventual judgment of the Court will be made impossible by the actions undertaken by the State against which the interim measures are requested. It is evident that neither of these two situations is present in this case. Even if one were to admit that the explorations conducted by Turkey did cause any harm to the rights of Greece, there would be no reason why such prejudice could not be compensated and one fails to see how it could possibly affect the execution of any judgment that the Court might give in the present case.⁵⁶

Applying this test to the case in hand, the Court declared that "the alleged breach by Turkey of the exclusivity of the right claimed by Greece to acquire information concerning the natural resources of areas of continental shelf, if it were established, is one that might be capable of reparation by appropriate means," that "it follows that the Court is unable to find in that alleged breach of Greece's rights such a risk of irreparable prejudice to the rights in issue before the Court as might require the exercise of its power under Article 41 of the Statute to indicate interim measures for their preservation,"⁵⁷ and on these grounds the Court declined to indicate such measures.

It is open to question whether the Court, in saying what it did, opened the proverbial Pandora's box or opened the way to a rational application of the test of "irreparable prejudice." One wonders, in this specific case, how the Court could have arrived at the conclusion that the prejudice, if one was found to have been created by Turkey, was "capable of reparation by appropriate means" without some inquiry and expert opinions,⁵⁸ and how Greece could be compensated for the "information" acquired by Turkey?⁵⁹ "Information" acquired by Turkey could affect negotiations

⁵⁴ *Id.* 10-11, para. 31.

⁵⁵ *Id.* 11, para. 33.

⁵⁶ Turkish Observations, 14-15, para. 20. The quoted passage is summarized by the Court in [1976] REP. 8, para. 18.

⁵⁷ *Id.* 11, para. 33.

⁵⁸ The Court does go into the question of the nature and physical effect of seismic exploration "according to the information before the Court." *Id.* 10, para. 30.

⁵⁹ In his Dissenting Opinion, Judge *ad hoc* Stassinopoulos considered "equally irreparable the prejudice caused by the gathering of information on the resources of

on delimitation even if it were disclosed to Greece. Be that as it may, it is sufficient to point out that the test of compensation or reparations has not been applied by the Court in cases in which it did indicate provisional measures. There is at least no evidence of any reasoning along some such lines in the *Anglo-Iranian Oil Company*,⁶⁰ the *Fisheries Jurisdiction*,⁶¹ or the *Nuclear Tests* cases.⁶² There was a strong probability, to put it no higher, that the prejudice which may have been caused to the United Kingdom in the first two cases could have been "remedied by the payment of a sum of money." And even in the last case reparation could not be excluded if Australia were able to prove specific damage.⁶³ However, as Judge Elias pointed out in a trenchant criticism of the Court, the possibility of compensation depends upon a state's capacity to pay and this additional test would require the Court to make possibly invidious distinctions between states as to their capacity to pay compensation. Judge Elias said:

Finally, the apparent acceptance by the majority of the Court that, once any damage resulting from the exploration and/or exploitation by Turkey is capable of being compensated for in cash or kind, Greece cannot be said to have suffered irreparable damage does not seem to me to be a valid one. It means that the State which has the ability to pay can under this principle commit wrongs against another State with impunity, since it discounts the fact that the injury by itself might be sufficient to cause irreparable harm to the national susceptibilities of the offended State. The rightness or wrongness of the action itself does not seem to matter. This is a principle upon which contemporary international law should frown: might should no longer be right in today's inter-State relations.⁶⁴

The President of the Court, Judge Jiménez de Aréchaga, construed the words "if it considers that circumstances so require" in Article 41 of the Statute as meaning that before the interim measures can be granted "all relevant circumstances must be present—including the possibility of jurisdiction over the merits. However, to refuse interim measures it suffices for only one of the relevant circumstances to be absent." In the present case, one of the "absent" circumstances was apparently the circumstance of "irreparable injury," for, in his view, the Court's finding that interim

the Greek shelf and the possibility of disclosing them [*sc.* information; in French original: "des renseignements"], which would raise an insurmountable obstacle to their exploitation by Greece." *Id.* 37.

⁶⁰ Order of July 5, 1951. [1951] ICJ REP. 89. On the question of compensation, see LAUTERPACHT, *supra* note 48, at 252.

⁶¹ Order of Aug. 17, 1972. [1972] ICJ REP. 12.

⁶² Order of June 22, 1973. [1973] ICJ REP. 99.

⁶³ The United States paid *ex gratia* compensations in the 1954 incident of the Japanese fishing boat *Diogo Fukuryu Maru*, the crew of which suffered injuries from radiation fallout. For details, see 4 WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 565 F (1965). In the *Nuclear Tests* case, the Court noted that no claim of damages was raised by Australia. [1974] ICJ REP. 270, para. 53.

⁶⁴ [1976] REP. 30.

measures were not required was based on "the existence of appropriate means of reparation or satisfaction."⁶⁵ That is, on the presence of a circumstance which, so far at any rate, has not been considered as included in Article 41. The question of jurisdiction will be taken up presently but, in view of the foregoing, one may agree with Judge Elias that "there are substantive as well as procedural questions raised in the consideration of the application of Article 41 of the Statute of the Court which require urgent and serious re-thinking by the Court."⁶⁶

There remains for consideration the second part of the Greek request for provisional measures, namely "the right of Greece to the performance by Turkey of its undertaking contained in Article 2, paragraph 4, and Article 33 of the Charter of the United Nations and Article 33 of the General Act"⁶⁷ . . . to abstain from all measures likely to react prejudicially upon the execution of any judicial decision given in these proceedings and to abstain from any sort of action which may aggravate or extend the present dispute between Greece and Turkey."⁶⁸ The Court declared that whereas this right "is not the subject of any of the several claims submitted to the Court by Greece in its Application; whereas it follows that this request does not fall within the provisions of Article 41 of the Statute."⁶⁹ The Court is no doubt on solid ground in saying that this right is not specifically included in the submissions formulated by Greece in its Application relating to the dispute. But this does not conclude the matter, for in another case, the *Anglo-Iranian Oil Company*, the Court did include among the provisional measures "which will apply on the basis of reciprocal observance:

2. That the Iranian Government and the United Kingdom Government should each ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court.⁷⁰

In its reasoning, the Court pointed out that as the object of Article 41 "is to preserve the respective rights of the Parties pending the decision of the Court," it follows "that the Court must be concerned to preserve by such measures the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent."⁷¹ The decisive link seems to be between the measure and the *petita* and not between the measure and the ground on which the party, rightly or wrongly, bases its request for interim measures.

⁶⁵ *Id.* 16.

⁶⁶ *Id.* 29.

⁶⁷ It will be recalled that the Court had decided to confine its examination of the request to Article 41. *Id.* 8, para. 21 and *supra*, p. 40.

⁶⁸ [1976] REP. 6, para. 15(ii).

⁶⁹ *Id.* 11, para. 34.

⁷⁰ [1951] ICJ REP. 89, at 93. See also Fisheries Jurisdiction case, [1972] ICJ REP. 17, para 1(a) of operative clause. For earlier cases, see LAUTERPACHT, *supra* note 48, at 282-83.

⁷¹ [1951] ICJ REP. 89, at 93. The Court invoked Article 61(6) of its old Rules of Procedure, now Article 66(6), which authorizes the Court to indicate interim measures *proprio motu* as additional basis for its indication.

The reason for the statement that "the Court does not find it necessary to examine" the question whether it has "an independent power" to indicate measures "in order to prevent the aggravation or extension of the dispute" is the adoption by the Security Council of Resolution 395(1976) on August 25, 1976, the day when the Court began public hearings.⁷² The Court was, of course, fully aware of the proceedings in the Council; it referred to the fourth and sixth preambular paragraphs and to operative paragraphs 2 and 3, as well as to the statements by Turkey and Greece made after the adoption of the resolution.⁷³ The Court then went on to say:

41. Whereas both Greece and Turkey, as Members of the United Nations, have expressly recognized the responsibility of the Security Council for the maintenance of international peace and security; whereas, in the above-mentioned resolution, the Security Council has recalled to them their obligations under the United Nations Charter with respect to the peaceful settlement of disputes, in the terms set out in paragraph 39 above; whereas, furthermore, as the Court has already stated, these obligations are clearly imperative in regard to their present dispute concerning the continental shelf in the Aegean; and whereas it is not to be presumed that either State will fail to heed its obligations under the Charter of the United Nations or fail to heed the recommendations of the Security Council addressed to them with respect to their present dispute;

42. Whereas, accordingly, it is not necessary for the Court to decide the question whether Article 41 of the Statute confers upon it the power to indicate interim measures of protection for the sole purpose of preventing the aggravation or extension of a dispute; . . .⁷⁴

It is clear that the Court left open the question whether its power under Article 41 extends to the indication of measures "for the sole purpose of preventing the aggravation . . . of a dispute."⁷⁵ In the present

⁷² [1976] REP. 5, paras. 6 and 9. The hearings were continued on August 26 and 27.

⁷³ *Id.* 12-13, paras. 37-40. The text of the preambular paragraphs referred to in paragraph 39 of the Order is as follows:

Bearing in mind the principles of the Charter of the United Nations concerning the peaceful settlement of disputes, as well as the various provisions of Chapter VI of the Charter concerning procedures and methods for the peaceful settlement of disputes, . . .

Conscious of the need for the parties both to respect each other's international rights and obligations and to avoid any incident which might lead to the aggravation of the situation and which, consequently, might compromise their efforts towards a peaceful solution, . . .

⁷⁴ *Id.* 13. In paragraph 43, the Court recalled Article 66(5) of its Rules of Procedure according to which a party may make a fresh request for interim measures "based on new facts."

⁷⁵ Rosenne seems to think that the Court has the power but should not exercise it in view of the availability of the political organs of the United Nations: "Nor, normally, ought this jurisdiction to be invoked to prevent 'incidents'. That was the rationale of the decision of the Permanent Court in the *South-Eastern Greenland* case. It applies with greater force when the Court is a principal organ of the United Nations, which has other organs—the Security Council and the General Assembly—equipped, to varying degrees, with competence to prevent 'incidents'." *Supra*, note 28, at 426. This is persuasive as far as it goes but if an applicant state in a conten-

case the Court did not feel compelled to take a stand because of the prompt or relatively prompt action by the Council. The Court found nothing in Article 41 or elsewhere in its Statute against the incorporation by reference, in its Order, of the relevant parts of Resolution 395.⁷⁶ On the other hand, the Court chose to ignore operative paragraph 4 of the resolution which includes a questionable reference to the potential role of the Court in the settlement of the dispute pending before it.⁷⁷

Although the action of the Court with respect to the Council resolution was supported by all of the 12 sitting judges—the Order was adopted by 12 votes to 1 (the Greek judge *ad hoc*)—Judge Mosler had some reservations about it.⁷⁸ Judge Lachs would have wished the Court to have made “a positive contribution to the solution of the dispute.” There is nothing in the Statute to preclude the Court from assisting states in the peaceful settlement of a dispute otherwise than by adjudication; in view of the intimate connection of the Court with the United Nations, the Court, he said, “should the more readily seize the opportunity of reminding the member States concerned in a dispute referred to it of certain obligations deriving from general international law or flowing from the Charter”; and while the Court “has given due prominence to this resolution” of August 25, 1976

tious proceedings also requests interim measures to prevent an aggravation of the dispute, it may well be part of the Court's judicial function to indicate such measures and not expect the applicant to appeal to the General Assembly, which may not be in session, or to the Security Council which may be prevented from taking useful action by a veto of one of its permanent members which may be in a patron-client relation to the respondent state. It seems pointless to procrastinate proceedings by referring the requesting party to Article 66(5) of the Court's Rules of Procedure.

⁷⁶ Thus Judge Elias, after referring to paragraph 41 of the Order—cited *supra*, note 74—said: “Since this must be the main object of the Greek Government's request and since the substance of the Security Council resolution which has thus been incorporated had been accepted as such by the Applicant, the Order has gone far towards achieving the desired result.” [1976] REP. 30.

⁷⁷ It will be recalled that the Court denied the Turkish request to remove the case from its list. *Supra*, p. 32. The Court in the operative part of its Order reserved “the fixing of time-limits for the said written proceedings [addressed to the jurisdiction of the Court], and the subsequent procedure, for further decision.” [1976] REP. 14. The time-limits were fixed by an Order of October 14, 1976, the Court fixed April 18, 1977 and October 24, 1977 for the delivery of the Greek Memorial and the Turkish Memorial, respectively. ICJ Communiqué No. 77/10, Oct. 14, 1976.

⁷⁸ While agreeing with the Court that the seismic exploration of the shelf “does not cause, of itself and in isolation, irreparable damage” justifying the application of Article 41, he said:

But I must express doubts regarding the Court's separation of the infringement of alleged Greek rights to exploration from the military measures, taken by both sides for purposes of the protection or supervision of the vessel, which involve a risk of armed conflict. I consider the military aspect not as a distinct element but simply as an aggravating circumstance additional to the basic element of continued exploration. In my view the Court should have considered that it was part of its overall responsibility to consider the situation as a whole, quite apart from its assessment of the Security Council's resolution and the reactions thereto of Greece and Turkey.

[1976] REP. 26.

in its reasoning,⁷⁹ there was, in his view, "no statutory bar to its spelling out the legal consequences of the Security Council's resolution and the official statements of the representatives of the two States. The pronouncements of the Council did not dispense the Court, an independent judicial organ, from expressing its own view on the serious situation in the disputed area."⁸⁰ Judge Lachs concluded his view of the proper role of the Court as a judicial organ in the following words:

While it would not be proper specifically to advise Greece and Turkey "as to the various courses" they should follow (*I.C.J. Reports 1951*, p. 83), the Court, acting *proprio motu*, should, even while not indicating interim measures, have laid greater stress on, in particular, the need for restraint on the part of both States and the possible consequences of any deterioration or extension of the conflict. In going further than it has, the Court, with all the weight of its judicial office, could have made its own constructive, albeit indirect, contribution, helping to pave the way to the friendly resolution of a dangerous dispute. This would have been consonant with a basic role of the Court within the international community.⁸¹

This is not the first time that the Court or its individual members have given voice to what might be called a dynamic conception of the role of the Court as a judicial organ. The emphasis on the connection between this Court and the United Nations was first made by the Court in connection with its advisory function.⁸² There may be room for some flexibility in interpreting the words in Article 38(1) of the Statute: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it" in accordance with, broadly speaking, the international law in force. Conceivably some jurists might be moved to decline to serve on a tribunal with so narrowly defined a mission. But if that is not the mission of this Court, then what is it? To offer advice to the parties which come before it seeking a judgment?

⁷⁹ Judge Tarazi also stressed that the Court being "an integral part of the United Nations," ought "if the circumstances so require . . . collaborate in the accomplishment of this fundamental mission," namely the responsibility of the Security Council for the maintenance of peace and security, and concluded that he "would have thought it necessary to mention this resolution in the operative part." *Id.* 33-34. There are apparently no limits to the consequences to be derived from the integration of the Court in the United Nations.

⁸⁰ *Id.* 20. One cannot fail to be reminded of the legal consequences which the Court spelled out in the *Nuclear Tests* case with respect to the statements made by several French officials. [1974] ICJ REP. 253, at 267, paras. 43 and 269, paras. 50-52. With regard to this case, see A. Rubin, *The International Legal Effects of Unilateral Declarations*, *supra*. pp. 1-30.

⁸¹ *Id.* 20. The reference in the quotation is to the *Haya de la Torre* case in which the Court was asked to declare how its judgment in the *Asylum* case of November 20, 1950, should be executed.

⁸² In *Peace Treaties* case, the Court declared:

The Court's Opinion is given not to States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organization, and, in principle, should not be refused.

[1950] ICJ REP. 65, at 71.

It is not easy to discern in Judge Lachs' cryptic observations what additional advice he wanted the Court to offer to the parties. In the present submission, the Court's weighty observations on the obligations flowing from Articles 2(4) and 33 of the Charter could have been completed only by adding the Court's "weight of its judicial office" to paragraph 4 of Resolution 395(1976) and advise the parties, or rather Greece, to withdraw its application and put an end to the judicial proceedings, if not *ad calendas graecas* then at least until the end of the current Third Law of the Sea Conference. Judge Tarazi may have expressed this intent quite clearly when he suggested that the Court should have mentioned "this resolution," the whole resolution, including its deleterious paragraph 4, in the operative part of its Order.

The desire of the Court to integrate itself ever more closely in the political activities of the United Nations may well be due, to some extent at any rate, to the growing number of *onusiens* elected to membership of the Court,⁸³ the greater emphasis on the principle of balanced or equitable geographical representation which has become pervasive in the United Nations, and the diminished concern with the personal qualification of the judges who should be, as Article 2 of the Statute provides, "jurisconsults of recognized competence in international law."⁸⁴ The integration process may well transform the Court into just another unit of the United Nations far removed from the center of its activities but the Court might as well pay heed to the import of this trend on its judicial business

⁸³ Rosenne, *The Composition of the Court* in Gross, *supra* note 38, at 428. The term refers to members of the Court "with a long history of personal involvement in United Nations affairs" and "who by way of experience and intellectual inclination possess an intangible psychological relationship with the United Nations." *Id.* 388.

⁸⁴ Sir Gerald Fitzmaurice in *Enlargement of the Contentious Jurisdiction of the Court* (in Gross, *supra*, note 38, at 469) stresses the need to elect jurists with expertise in public international law. Experience in international affairs and other branches of law does "not furnish an adequate substitute. It cannot be a good thing for the Court that members of it have to start learning—or re-learning—their public international law after they come to it." For comments on the suggestion of Fitzmaurice, see INSTITUT DE DROIT INTERNATIONAL LIVRE DU CENTENAIRE 1873-1973, at 277, 391 (Bindschedler), 391-95 (Petrén), 395-96 (Reuter), 397 (Ruegger), and 400 (Rosenne) (1973).

Having been a member of the Court from 1960 to 1973, Fitzmaurice speaks from experience. Rosenne maintains that the qualifications of the candidates and "the records of the judges as are apparent from their separate and dissenting opinions (the only proper source of information on this subject) will show that the exacting standards of professional qualification and competence imposed by the Statute (Article 2) are generally reached." On the other hand, he notes that in trying to strike the balance between personal criteria and the demands of balanced geographical representation "not surprisingly perhaps, the two electoral colleges, being political organs, have come down heavily in favor of the politically directed criteria . . .". Gross, *supra* 382. Membership in the International Law Commission, which Rosenne lists as a factor (*id.* 381), is not necessarily a criterion of professional competence as the elections to this organ have also come to be dominated by political criteria and considerations of balanced geographical representation. On the subject of the composition of the Court, see also Gross, *supra*, 729-30.

and the trend for states to submit disputes to arbitral tribunals rather than to the Court.⁸⁵

B. Jurisdiction of the Court

The impressive degree of cohesion exhibited by the judges in the 12 to 1 vote on the indication or, rather, nonindication of interim measures of protection stands in sharp contrast to the disarray with respect to the question of jurisdiction. Of the twelve judges who constituted the majority, eight wrote separate opinions of which three seem to support and five to oppose the decision of the Court on this question. The Greek *ad hoc* judge also dissented. The Court deals with this important matter in a single sentence which is as follows:

Whereas, in order to pronounce on the present request for interim measures of protection, the Court is not called upon to decide any question of its jurisdiction to entertain the merits of the case; . . .⁸⁶

In recent cases the Court specifically addressed the question of jurisdiction in connection with requests for indication of provisional measures. Thus in the *Fisheries Jurisdiction* case the Court said while it "need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is *manifest*."⁸⁷ Having considered the basis of jurisdiction invoked by the United Kingdom, the Court said that this provision "in an instrument emanating from both Parties to the dispute appears, *prima facie*, to afford a *possible* basis on which the jurisdiction of the Court might be founded."⁸⁸ Similarly, in the *Nuclear Tests* cases, the Court held "that the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded."⁸⁹

⁸⁵ The revised Rules of Court have in fact acknowledged this trend but tried to capture it by opening up an opportunity for arbitral tribunals functioning within the framework of the Court. See E. Hambro, *Will the Revised Rules of Court Lead to Greater Willingness on the Part of Prospective Clients?*, in Gross, *supra*, note 38, at 365-76. It is not suggested that the trend noted in the text is the only or a primary reason why states eschew recourse to the Court. On this subject, as well as possible remedies, see Gross, *supra*, *passim*.

⁸⁶ [1976] REP. 13, para. 44. The rest of the sentence is unobjectionable and reads as follows: "—and whereas the decision given in these proceedings in no way prejudices any such question, or any question relating to the merits, and leaves unaffected the rights of the Greek and Turkish Governments to submit arguments in respect of any of these questions."

⁸⁷ [1972] ICJ REP. 12, at 15, para. 15 (emphasis supplied).

⁸⁸ *Id.* 16, para. 17 (emphasis supplied).

⁸⁹ [1973] ICJ REP. 99, at 102, para. 17. In the *Trial of Pakistani Prisoners of War* case, the Court did not refer to the basis of jurisdiction invoked by Pakistan, if there was one, and found it unnecessary to deal with the Pakistani request for provisional measures on the ground that Pakistan requested postponement of its request. *Id.* 328, at 330, para. 14. Nevertheless, Judge Petráň, in his Dissenting Opinion, expressed the view that "the first question to which the Court should have attended was that of its own jurisdiction on the merits of the case." *Id.* 334.

In an earlier case, the *Anglo-Iranian Oil Company*, the Court granted the British request for interim measures, although its jurisdiction was contested by Iran, after having satisfied itself that "it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction."⁹⁰ Judges Winiarski and Badawi Pasha in their Dissenting Opinion objected to the decision of the Court saying: "The question of interim measures of protection is linked, for the Court, with the question of jurisdiction; the Court has power to indicate such measures only if it holds, should it be only provisionally, that it is competent to hear the case on its merits."⁹¹

In *Interhandel*, the only case in which this Court found "that there is no need to indicate interim measures of protection," the Court, at the outset of its consideration of the Swiss request, declared that both Switzerland and the United States "have, by Declarations made on their behalf, accepted the compulsory jurisdiction of the Court on the basis of Article 36, paragraph 2, of the Statute."⁹² The United States invoked its self-judging reservation, known as the Connally reservation, even against the indication of provisional measures, but the Court felt relieved of the need to examine its validity by the Swiss Co-Agent. He challenged the reservation on several grounds but also stated at the hearing "that, in its examination of a request for the indication of interim measures of protection, the Court would not wish to adjudicate upon so complex and delicate a question as

⁹⁰ [1951] ICJ REP. 89, at 93. The Court continued that "the considerations stated in the preceding paragraph suffice to empower the Court to entertain the Request for interim measures of protection." This case is unusual because the President of the Court addressed a telegram to the Prime Minister of Iran on June 23, 1951, the day after receiving the British request, suggesting that no measures be taken which might impede the execution and eventual judgment or aggravate the dispute. The hearing in this case was held on June 30. *Id.* 91 and 92.

⁹¹ *Id.* 96. These two judges, elaborating the cited statement, pointed out that the text of Article 41 presupposes the competence of the Court, inasmuch as there must be "proceedings" and "parties" within the meaning of the Statute. The Court need not pronounce "finally" on its jurisdiction "but the Court must consider its competence reasonably probable," and "its opinion on this point should be reached after a summary consideration." *Id.* 96 and 97. The judges rejected any presumption in favor of the Court's power by pointing out that under Article 41 the power of the Court is not unconditional and that generally speaking

We find it difficult to accept the view that if *prima facie* the total lack of jurisdiction of the Court is not patent, that is, if there is a possibility, however remote, that the Court may be competent, then it may indicate interim measures of protection. This approach, which also involves an element of judgment, and which does not reserve to any greater extent the right of the Court to give a final decision as to its jurisdiction, appears however to be based on a presumption in favour of the competence of the Court which is not in consonance with the principles of international law. In order to accord with these principles, the position should be reversed; if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated.

Id. 97. For argument against the probability test, see LAUTERPACHT, *supra* note 48, at 255, particularly nn. 41 and 42.

⁹² [1957] ICJ REP. 105, at 110.

the validity of the American reservation'.⁹³ Judge Lauterpacht, in his Separate Opinion, agreed with the U.S. contention that the objection "removed the basis for any assumption of a *prima facie* jurisdiction of the Court on the merits of the dispute and that the Court therefore lacked the power to exercise jurisdiction under Article 41 of the Statute." In his view, governments "have the right to expect that the Court will not act under Article 41 in cases in which absence of jurisdiction on the merits is manifest." He stated that

The correct principle . . . which has been uniformly adopted in international arbitral and judicial practice is as follows: The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction. These conditions do not exist in the case now before the Court.⁹⁴

In the opinion of Judge Lauterpacht this principle applies whether the Court exercises jurisdiction "by granting the request for an indication of interim measures or by declining it."⁹⁵ He argued that the Court had assumed jurisdiction with regard to the Swiss request and although "it has declined to grant it," the Order is "contrary to a conclusive condition under which the jurisdiction of the Court has been accepted."⁹⁶

It appears from this survey that although opinions differ about the proper construction of instruments conferring jurisdiction upon it, the Court itself considered that no matter how tenuous—as in the *Anglo-Iranian Oil Company* case, where it is most tenuous—there must be a link between jurisdiction on the merits and the power to indicate provisional measures or to deny them. The present case departs from what may be regarded as the constant jurisprudence of the Court. The President, Judge Aréchaga, in explaining this departure in his Separate Opinion, argued that "Article 41 is an autonomous grant of jurisdiction to the Court, independent from its jurisdiction over the merits of the dispute," that the possibility of jurisdiction is only one of the relevant circumstances, and that it would make no sense to indicate measures unless there was "reasonable possibility, *prima facie* ascertained by the Court, of jurisdiction on the merits." In this case interim measures were not required because there was no danger of irreparable injury in view of the existence of appropriate means of satisfaction, and "having reached this conclusion it was not necessary for the

⁹³ *Id.* 111. The Court also said that the decision given under Article 61 of Rules of Court—Article 66 of the revised Rules—does not prejudice the question of jurisdiction on the merits.

⁹⁴ *Id.* 118-19 (emphasis in the original). See also LAUTERPACHT, *supra* note 48, at 111-12 for an identical statement, and also *id.* at 255.

⁹⁵ [1957] ICJ REP. 119 and also at 120.

⁹⁶ *Id.* 120. Some of the material presented here is contained in the Turkish Observations at 5-8. Turkey argued that the Court lacked *prima facie* jurisdiction because the General Act was no longer in force and the Brussels Agreement did not constitute a commitment to submit the dispute to the Court without a special agreement. *Id.* 8-9.

Court to make any determination as to the prospect of its jurisdiction with regard to the merits, even on a *prima facie* basis.”⁹⁷ In a nutshell, if the Court rejects a request for provisional measures, it need not concern itself with the question of jurisdiction.

It is not necessary to examine the proposition that under Article 41 the Court enjoys power independent from jurisdiction on the merits. Judge Mosler correctly pointed out, it is believed, that the power under Article 41 is not “an independent source of jurisdiction on the same footing and of the same legal quality as Article 36.” In his view, it is “an autonomous grant of jurisdiction” only to the extent “that it permits that the grounds conferring jurisdiction in conformity with the basic Article [Art. 36 of the Statute] are to be examined only to the extent that this can be done without endangering the urgency with which a request for interim measures must be considered.”⁹⁸

Judge Nagendra Singh agreed with the President’s view that the question of competence does not arise if the Court finds that no circumstances exist which would justify exercise of its powers under Article 41.⁹⁹ Judge Elias, without referring to the distinction between a positive or a negative de-

⁹⁷ [1976] REP. 15-16. As a further reason for declining the request the Court relied on the action taken by the Security Council.

⁹⁸ *Id.* 24. The link between jurisdiction on merits and provisional measures was developed persuasively by Judges Winiarski and Badawi Pasha in their Dissenting Opinion in the *Anglo-Iranian Oil Company* case where the link was stretched by the Court to the breaking point. In view of the confusion reflected in the present case, it seems worthwhile to quote their statement:

In international law it is the consent of the parties which confers jurisdiction on the Court; the Court has jurisdiction only in so far as that jurisdiction has been accepted by the parties. The power given to the Court by Article 41 is not unconditional; it is given for the purposes of the proceedings and is limited to those proceedings. If there is no jurisdiction as to the merits, there can be no jurisdiction to indicate interim measures of protection. Measures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State. For this reason, too, the Court ought not to indicate interim measures of protection unless its competence, in the event of this being challenged, appears to the Court to be nevertheless reasonably probable. Its opinion on this point should be reached after a summary consideration; it can only be provisional and cannot prejudge its final decision, after the detailed consideration to which the Court will proceed in the course of adjudicating on the question in conformity with all the Rules laid down for its procedure.

[1951] ICJ REP. 97. Rosenne affirmed “that there is no essential interconnexion” between the jurisdiction of the Court under Article 41 and its jurisdiction on the merits, but concludes as follows: “Having regard to the exceptional power which this jurisdiction [under Art. 41] involves, it may be arguable that it ought to, be more closely integrated with the principal jurisdiction to deal with the case on the merits than it now is.” *Supra*, note 38, at 428. See also Briggs, *The Incidental Jurisdiction of the International Court of Justice as Compulsory Jurisdiction*, in K. ZEMANEK (ed.), *VÖLKERRECHT UND RECHTLICHES WELTBILD. FESTSCHRIFT FÜR ALFRED VERDROSS* 87, at 92 ff. (1960). In his view, states by becoming parties to the Statute have consented to the incidental jurisdiction of the Court of which Article 41 is a part. *Id.* 93 f.

⁹⁹ [1976] REP. 17. Judge Nagendra Singh would require a more exacting degree of jurisdiction for the indication of measures than “*prima facie*” jurisdiction or “no manifest lack” of it. “The acid test,” in his view, “of the Court’s competence . . . is that the judgment must be within clear prospect.”

cision on a request, agrees with the majority view that "it is not necessary to decide the question [of jurisdiction to entertain the Greek request for interim measures] for the purpose of indicating provisional measures of protection under Article 41 of the Statute of the Court."¹⁰⁰

Judge Lachs, disagreeing with the Court, stated that the Court was "under an obligation to consider the issue [of jurisdiction] *proprio motu* and make clear its provisional view thereon, notwithstanding the negative answer it felt bound to give the request for interim measures."¹⁰¹ Judge Ruda, in a remarkably short Separate Opinion, expressed his agreement with Lauterpacht's view in the *Interhandel* case¹⁰² and, disagreeing with the Court, stated that "the Court cannot decide on a request for interim measures of protection, without having considered, at least *prima facie*, the basic question of its own jurisdiction to entertain the merits of the dispute."¹⁰³ Judge Mosler, whose views on the question of principle have already been presented, appears to disagree with the President's view that the question of jurisdiction is a circumstance within the meaning of Article 41. In his opinion it is "a precondition of the examination whether such circumstances exist." He also rightly, it is submitted, declared:

If the Court however, as in the present Order, rejects the request because the circumstances are not considered to require interim measures, it examines the legal situation existing between the parties to the dispute and thus, to that extent, also assumes jurisdiction. But in this hypothesis the Court has only to satisfy itself that it does not manifestly lack jurisdiction, since the Order does nothing to interfere with the rights of the respondent party.¹⁰⁴

Judge Tarazi dissented from the view that under Article 41 "the Court possesses a special competence which is in some way different from its basic, specific jurisdiction as conferred by Article 36" of the Statute. In his view "the power conferred upon it by Article 41 to indicate interim measures when appropriate is merely a corollary of its jurisdiction under Article 36"; only "a more thoroughgoing examination" of the relevant instruments, would enable the Court to pronounce upon the issue of jurisdiction. Existing ambiguities could be resolved only "after written and oral proceedings had taken place in the normal way."¹⁰⁵

Taken literally, Judge Tarazi would break with the jurisprudence of the Court which has been content with some preliminary tests such as *prima*

¹⁰⁰ *Id.* 27.

¹⁰¹ *Id.* 19.

¹⁰² See *supra*, p. 50 at note 94.

¹⁰³ [1976] REP. 23.

¹⁰⁴ *Id.* 25. In order fully to understand Judge Mosler's point, it may be useful to quote his "attempted definition of the criteria of a positive *prima facie* test" which is as follows:

In view of the provisional character of the requested Order and bearing in mind that it in no way prejudices the decisions to be taken in the forthcoming proceedings, it is in my view sufficient that the Court, when it actually indicates interim measures, should have reached the provisional conviction, based on a summary examination of the material before it (including written observations of a party not represented) and subject to any objections which may be raised in subsequent proceedings, that it has jurisdiction on the merits of the case.

Id. 24. See also Judge Lauterpacht's view, *supra*, at note 95.

¹⁰⁵ *Id.* 32.

facie. There is no doubt whatever that this is the position of Judge Morozov, who, without writing a separate or dissenting opinion, participated in the three recent cases in which the Court applied a provisional or summary test to the question of jurisdiction in connection with the application Article 41 measures.¹⁰⁶ Briefly, Judge Morozov's argument was that the provisions in Chapter III of the Statute entitled "Procedure" have no independent significance from Chapter II entitled "Competence of the Court," that as the Turkish Government had suggested lack of jurisdiction, "it was the primary duty of the Court to consider the question of its jurisdiction" and he stressed "that the Court has no right to consider either the question of appointment of a judge *ad hoc* under Article 31, paragraph 3, of the Statute, or the question of interim measures of protection, before it has satisfied itself that it has jurisdiction in accordance with Articles 36 and 37 of the Statute."¹⁰⁷ He also objected to the statement of the Court¹⁰⁸ that the absence of Turkey from the hearings "cannot by itself constitute an obstacle to the indication of interim measures of protection" on the ground that pursuant to Article 52(2) of the Statute, the Court, in such a case, "must satisfy itself that it has jurisdiction."¹⁰⁹

The judge *ad hoc* in this case joined the group of judges who urged the necessity of finding some basis of jurisdiction. As Judge Stassinopoulos put it:

the Court must satisfy itself, by an extremely summary examination, that it has *prima facie* jurisdiction to deal with the merits of the case. Not only does that rule emerge from the Court's jurisprudence, but it also constitutes a general principle governing all analogous institutions.¹¹⁰

It is obvious that some middle ground will have to be found between a more or less mechanical and superficial test of jurisdiction prior to the indication of provisional measures or the rejection of a request for it and the desire of Judges Tarazi and Morozov for a test which would amount to a full airing of the question of jurisdiction on merits in extended written

¹⁰⁶ These cases are summarized, *supra*, p. 42. Referring to this practice in which he participated, Judge Morozov pointed out that neither the Statute nor the Rules of Court "contain any provisions which provide that the request for interim measures of protection has any priority over the question of jurisdiction. The precedents afforded by cases in which the Court has sometimes made Orders on the question of interim measures of protection contrary to its Statute and Rules cannot be regarded as having any value in the argument." [1976] REP. 22.

¹⁰⁷ *Id.* 21.

¹⁰⁸ *Id.* 6, para. 13.

¹⁰⁹ *Id.* 22. It may be of interest to note that Judge Gros participated in the Order in the present case although in his Dissenting Opinion in the *Nuclear Tests* case he argued strongly that it was not "in accordance with the rules of procedure to suspend the application of Article 53 provisionally in the present case on the ground that this is an interim measures phase." [1973] ICJ REP. 99, at 117. It may be that Article 53 could be suspended if the Court declined to indicate the requested measures and to that extent his earlier emphatically expressed view may appear to be modified.

¹¹⁰ [1976] REP. 39.

and oral pleadings. Judge Elias was certainly right, seeing the disarray of opinions on this matter, in suggesting that it requires "urgent and serious re-thinking by the Court."¹¹¹ As there is no other case pending before the Court and this case is not likely to come up for a hearing on the question of jurisdiction before the end of 1977,¹¹² the Court has ample time, if it so desires, to examine the question with the thoroughness that it deserves. The prestige of and the confidence in the Court suffer if the judges are as divided as they were in this case on a relatively simple, but from the point of view of the state interests involved, fundamental issue. However, considering the fluctuations in the composition of the Court due to the triennial system of elections, it would be desirable, if the Court finds a formula for the future, to include it in the Rules of Court. Then governments would be on notice with respect to the test of jurisdiction which the Court requires for entertaining a request for interim measures and be prepared to furnish the Court with the necessary written and oral arguments.

IV.

CONCLUDING OBSERVATIONS

A further point may deserve consideration in this context. Pursuant to Article 35(2) of the Rules of Court (Art. 32(2) of the 1964 Rules), in case of unilateral arraignment, the application "must also, as far as possible, specify the provision on which the applicant founds the jurisdiction of the Court." The flexibility built into this rule—"must . . . as far as possible"—opens the way to the assumption of jurisdiction on the basis of *forum prorogatum*. It is not necessary to examine this doctrine here in all its ramifications¹¹³ but one aspect of it may help explain the reason why with some regularity, one might be tempted to say with alarming regularity, states abstain from participating in the proceedings before the Court initiated by a unilateral application. In the present Court, the *forum prorogatum* doctrine was first applied in the *Corfu Channel* case. Proceedings in this case were instituted by a unilateral application transmitted to the Court on May 22, 1947, in which the United Kingdom founded the jurisdiction on the combined effect of four factors: Article 36(1) of the Statute, the resolution of the Security Council of April 9, 1947, the participation of Albania in the Council proceedings under Article 32 of the Charter, and, finally, Article 25 of the Charter.¹¹⁴

The Albanian Government, in a letter of July 23, 1947, rejected the British argument and contended that the case could be brought before the Court only by special agreement. However, it also stated that, inspired by certain lofty principles, "it is prepared, notwithstanding this irregularity in the action taken by the Government of the United Kingdom, to appear

¹¹¹ *Id.* 29. See *supra*, p. 42.

¹¹² See *supra*, note 77 for the time-limits fixed for the filing of written pleadings.

¹¹³ The doctrine is discussed by ROSENNE, *supra*, note 38, at 344-63.

¹¹⁴ [1947-48] ICJ REP. 17 and 1 *Corfu Channel Case*, ICJ Pleadings 8 (1947).

before the Court" and "that its acceptance of the Court's jurisdiction for this case cannot constitute a precedent for the future."¹¹⁵ The first reaction to this letter was an Order made by the President of the Court on July 31, 1947, which stated:

Whereas, having regard to the Resolution of the Security Council of April 9th, 1947, the said note of the Albanian Government may be regarded as constituting the document mentioned in Article 36 of the Rules of Court.¹¹⁶

Thus Albania, probably unwittingly, supplied the missing link which established it as the respondent in the proceedings. This is apparent from the Memorial of the United Kingdom in which it interpreted the Albanian letter as accepting "the jurisdiction of the Court in the present dispute" and for this reason "the difference of opinion as to the effect of Article 25 of the Charter is of no practical importance for the purposes of the present case."¹¹⁷ Albania endeavored to retrieve its slip, if that is what it was, in its Preliminary Objections¹¹⁸ and in the oral hearings,¹¹⁹ which was of no avail. In its statement on the Preliminary Objection, the United Kingdom held Albania to the letter¹²⁰ and declared: "Having once consented to the jurisdiction, the Albanian Government cannot afterwards withdraw its consent."¹²¹

The Court rejected the Albanian charge that the proceedings were irregularly instituted¹²² and declared:

In submitting the case by means of an Application, the Government of the United Kingdom gave the Albanian Government the opportunity

¹¹⁵ [1947-48] ICJ REP. 19 and 46. Albania reiterated its reservations but also appointed its Agent. *Ibid.* The full text of Albania's letter is in 2 Pleadings 25 (1947).

¹¹⁶ [1947-1948] ICJ REP. 20. For the full text of the Order, see *id.* 4.

¹¹⁷ 1 Pleadings 20 (1947).

¹¹⁸ [1947-48] ICJ REP. 20-23.

¹¹⁹ See the statement by the representative of Albania, Vochoç, in 3 Pleadings 48 (1947).

¹²⁰ "Even if (which is not admitted) there was any formal irregularity in the mode of commencement of the present proceedings, this irregularity has been *cured*, because the Albanian Government by its letter of 2nd July, 1947, has *waived* any possible objection and has consented to the jurisdiction of the Court. An irregularity in the manner in which a case is introduced may be cured by subsequent events . . ." [1947-48] ICJ REP. 24 (emphasis supplied).

¹²¹ *Id.* This theme, that Albania was trying to go back on its acceptance, was elaborated by Sir Hartley Shawcross in the hearings. See 3 Pleadings 56, 76, 154 (1947).

¹²² Rejecting the Albanian assumption that "the institution of proceedings by application is only possible where compulsory jurisdiction exists and that, where it does not, proceedings can only be instituted by special agreement," the Court declared:

This is a mere assertion which is not justified by either of the texts cited. Article 32, paragraph 2, of the Rules does not require the Applicant, as an absolute necessity, but only "as far as possible," to specify in the application the provision on which he founds the jurisdiction of the Court. It clearly implies, both by its actual terms and by the reasons underlying it, that the institution of proceedings by application is not exclusively reserved for the domain of compulsory jurisdiction.

[1947-48] ICJ REP. 27.

of accepting the jurisdiction of the Court. This acceptance was given in the Albanian Government's letter of July 2nd, 1947 . . .

Furthermore, there is nothing to prevent the acceptance of jurisdiction, as in the present case, from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement.¹²³

It may be idle to speculate, thirty years later, whether the Court was inspired by the maxim *boni judicis est ampliare jurisdictionem* or whether it was unduly harsh on Albania. In any event the outcome in the *Corfu Channel* case¹²⁴ left traces which can be seen in a later case, the *Anglo-Iranian Oil Company* case. In the application of May 26, 1951, instituting proceedings against Iran, the United Kingdom invoked the declaration of September 19, 1932 whereby the Government of Persia had accepted the jurisdiction of the Permanent Court of International Justice as compulsory under Article 36(2) of its Statute. Referring to the *Corfu Channel* case, it also submitted:

Alternatively, whether or not the Court has the right to exercise jurisdiction in this case by virtue of the terms of the aforementioned declaration . . . the Government of the United Kingdom expects that Iran as a Member of the United Nations¹²⁵ . . . will appear before the Court voluntarily in order to hear and answer on their merits the arguments of the Government of the United Kingdom.¹²⁶

The Iranian Government, which seems to have been better served by expert advice than had been the Albanian Government, declined the proffered bait and in carefully conceived language, submitted observations dated February 4, 1952, the sole purpose of which was to demonstrate the lack of competence of the Court and reject its jurisdiction. It went on to say:

Il ne s'agit donc pas ici d'un contremémoire dont on pourrait induire qu'il lie la procédure devant la Cour, mais seulement de refuter le mémoire du Gouvernement anglais en date du 10 octobre 1951 et uniquement sur les points qui ont trait à la compétence de la Cour.¹²⁷

¹²³ *Id.* 27-28. The Court went on to quote from Judgment No. 12, of April 26, 1928 in the *Minority Schools in Upper Silesia* case of the PCIJ:

The acceptance by a State of the Court's jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms, such as, for instance, the previous conclusion of a special agreement.

See 2 HUDSON, *WORLD COURT REPORTS* 284 (1935).

¹²⁴ It may be recalled that the outcome must have appeared sufficiently doubtful to both parties because they did conclude a special agreement in which Albania was able to include a complaint against the United Kingdom relating to the "Operation Letail" on which the Court gave judgment in favor of Albania. [1949] ICJ REP. 4 at 36.

¹²⁵ There follow citations to Articles 1(1) and 36(3) of the Charter.

¹²⁶ *Anglo-Iranian Oil Company* case, Pleadings 8, at 17-18 (1951).

¹²⁷ *Id.* 281. In the author's translation:

There can be no question here of a counter-memorial which could be construed as completing the procedure before the Court, rather it is intended for the sole purpose of rejecting the Memorial of the British Government dated October 10, 1951, and is limited exclusively to the jurisdiction of the Court.

It is interesting to note that Iran characterized the nationalization of the Company as "an act of national liberation." *Id.* 306.

In order to make doubly sure that the doctrine of *forum prorogatum* would be excluded by any act which could be construed as tacit or implied consent to jurisdiction, the Iranian Government chose to be absent from the proceedings.¹²⁸ The Court indicated interim measures of protection which, as is well known, were ignored. At a later stage the Court found, as was predicted by Judges Winiarski and Badawi Pasha, that it had no jurisdiction on the merits.¹²⁹

In the instant case, the *Aegean* dispute, the Turkish Government took its precautions against any possible application of the *forum prorogatum*. It was absent from the hearing but this may well be explained, as indeed it was, by the short notice given by the Court.¹³⁰ In its letter of transmittal, dated August 25, 1976, it is stated:

On the assurance which was given by the President of the International Court of Justice to the Turkish Ambassador at The Hague during their informal conversation on 18 August 1976, it is understood that the presentation of the attached observations to the International Court of Justice shall not imply any commitment as to the jurisdiction of the Court.

This express reservation was restated in the Observations.¹³¹ The unsettling effect of the *forum prorogatum* doctrine may also be gauged from the fact that in acknowledging the receipt of the Greek Application and Request for interim measures, Turkey felt bound to declare, through its Ambassador, that it did so "with the understanding that this would commit neither himself nor his Government."¹³² It may well be correct that, according

¹²⁸ It is pertinent to cite in this context the following statement from the Dissenting Opinion of Judges Winiarski and Badawi Pasha:

There are certainly cases in which the objection to the jurisdiction is regarded as a mere ground of defence, and in which the party overruled in its objection continues to take part in the proceedings. But in this case the facts are quite different. Iran affirms that it has not accepted the jurisdiction of the Court in the present matter and that it is in no way bound in law; it has refused to appear before the Court and has put forward reasons for its attitude. The Court ought therefore to decide, in a summary way and provisionally, for the purpose of arriving at the decision which it must take on the question of interim measures of protection, which is the more probable of the two conclusions which it may finally come to on the question of its jurisdiction.

[1951] ICJ REP. 98.

¹²⁹ [1952] REP. 93, at 111. For the prediction, see [1951] ICJ REP. 98. An attempt by the United Kingdom to apply the doctrine of *forum prorogatum* to certain submissions by Iran was firmly rejected by the Court in holding:

The principle of *forum prorogatum*, if it could be applied to the present case, would have to be based on some conduct or statement of the Government of Iran which involved an element of consent regarding the jurisdiction of the Court. . . . It is true that it has submitted other Objections which have no direct bearing on the question of jurisdiction. But they are clearly designed as measures of defence which it would be necessary to examine only if Iran's Objection to the jurisdiction were rejected.

[1952] ICJ REP. 101, at 113-14. See ROSENNE, *supra* note 38, at 360-61.

¹³⁰ Turkish Observations 2, para. 5.

¹³¹ "Nevertheless, so that the Court may be informed that, in the view of the Turkish Government, the Greek request is without merit, Turkey is submitting the present observations without commitments." *Ibid.*

¹³² *Id.* 1, para. 2.

to a general principle of international law applicable also in international litigation, and therefore in proceedings before the Court, "a party is not permitted to benefit from its own inconsistencies."¹³³ However, no inconsistency is involved when a state declares it has not agreed to jurisdiction and it is undesirable to attempt to erode the principle of consent by indirection as long as it is resistant to a frontal attack.¹³⁴

The question then is whether any lesson can be learned from past experience. It is suggested that a lesson can be learned by an analogy from domestic judicial practice. It is well established in Anglo-American jurisprudence that a foreign sovereign cannot be impleaded in the courts of another country without its consent. There are various ways for asserting this sovereign immunity from suit. One of these is for the foreign sovereign to appear in court "specially," that is for the sole purpose of asserting its immunity. An appearance so made precludes any imputation of submission, tacitly or by implication, to the jurisdiction of the court on the merits. It would seem that a procedure along these lines might go a long way towards restoring confidence in the fairness of the International Court's procedure on jurisdiction, particularly, but not necessarily exclusively, in connection with requests for interim measures of protection.¹³⁵ By appearing voluntarily to contest a claimed title to jurisdiction, the state should not be held to have consented, by *this appearance alone*, to the jurisdiction of the Court to indicate measures of protection or to jurisdiction on the merits.

It is submitted that in the *Corfu Channel* case the Albanian letter of July 2, 1947, could easily have been interpreted in the sense of willingness "to appear before the Court," as it explicitly stated, for the sole purpose of contesting the title of jurisdiction invoked by the United Kingdom in its application. The Iranian Government in its observations expressed itself with greater prudence but did not appear in Court. The Turkish Government in the *Aegean* dispute might conceivably have appeared in Court in spite of the extremely tight time-limit, if that could have been done without any risk that its appearance could or would be construed as admission of jurisdiction. The issue may not be as clear cut in the other case. The suggestion here made would probably be less helpful in cases like the *Fisheries Jurisdiction* case. It might have had some relevance in the *Nu-*

¹³³ ROSENNE, *supra*, note 38, at 348.

¹³⁴ After reviewing the relevant cases and their aftermath, Rosenne concludes: "No doubt the connexion between these instances of the failure of the judicial process and the doctrine of *forum prorogatum* is purely fortuitous. Nevertheless, hesitation over the practical wisdom of the Court's attitude is necessarily strong and, so far, unresolved." *Id.* 363. It may be added that this hesitation has been reinforced by the Court's jurisprudence in more recent years.

¹³⁵ This point was made by Sir Hartley Shawcross, who reviewing the alternatives open to Albania, stated:

The second course was that the Government of Albania might have appeared and objected to the jurisdiction—appearing only in order to argue its objection on the grounds of competence; not submitting itself to the jurisdiction of the Court at all, but appearing before the Court in order to argue that the Court was not competent. Clearly that course was open to the Government of Albania if it chose to take it.

3 *Corfu Channel* case, ICJ Pleadings 56 (1947).

clear Tests case. In that case Australia invoked two bases of jurisdiction. One was the French Déclaration of May 20, 1966 made pursuant to Article 36(2) of the Statute. This excluded explicitly "disputes concerning activities connected with national defence." This clause would fall into the category suggested by Lauterpacht, namely that the *prima facie* assumption of jurisdiction is permissible if the Declaration "incorporates no reservations obviously excluding jurisdiction."¹³⁶ The other title of jurisdiction invoked by Australia in the *Nuclear Tests* case, as it was in the present case by Greece, is the General Act of 1928. Its continued validity is certainly not clear nor is its invalidity "obviously" clear, as was claimed by France in the former¹³⁷ and suggested by Turkey in the latter case.¹³⁸ The matter was further complicated by the Turkish claim that the French reservation to its acceptance of the General Act clearly excluded the jurisdiction of the Court¹³⁹ and by the French claim that its later reservation in the 1966 Declaration should be applied to its earlier acceptance of the General Act.¹⁴⁰ Perhaps the interests of a sound administration of justice in disputes between sovereign states would have been served better if both France and Turkey could have had the possibility open to them to appear specially before the Court for the sole purpose of arguing the validity of the General Act, leaving open the way for arguments on the applicability of the reservation to the jurisdiction of the Court founded on the General Act. This Act may well have ceased to be a usable basis of jurisdiction of this Court but it cannot be excluded that states may find in their archives jurisdictional clauses which they may consider of some validity in instituting proceedings before the Court. The procedural remedy here suggested might well be useful to dispose of such clauses without risk to the respondent party.

If the Court takes the question of the relationship between jurisdiction and Article 41 measures under consideration, it might also consider providing in its Rules for the possibility of "respondent" states appearing specially, in conformity with the principle that no state may be impleaded without its consent.

¹³⁶ *Supra*, p. 50, at note 94.

¹³⁸ Turkish Observations 10, para. 16.

¹⁴⁰ [1973] ICJ REP. 102, para. 15.

¹³⁷ [1973] ICJ REP. 102, para. 15.

¹³⁹ *Id.* 10-12, and *supra*, note 14.

AUTOINTERPRETATION, COMPETENCE, AND THE CONTINUING VALIDITY OF ARTICLE 2(7) OF THE UN CHARTER

By J. S. Watson *

INTRODUCTION

With the failure of the United Nations to control the use of force by states to the degree that many had wished for, the attention of many commentators shifted to what was hoped would be more fertile ground—the protection of human rights, self-determination, and other areas in which the organization might play a supranational role. In discussing the development of the supranational aspect of the organization, attention is invariably directed to Article 2(7) of the Charter which is, of course, the current symbol of sovereignty. Since most visionaries are frustrated by the concept of sovereignty, it is not surprising that this article has received little sympathy on the part of many who are more concerned with ends than means. Yet it is doubtful whether the concept may be dismissed summarily and, since it plays such a key role in so many of the allegedly developing fields of international law, one would do well to consider how Article 2(7), properly interpreted, affects the legal assumption on which supranationalism is based.

The thrust of this article is quite simply that the power to make authoritative interpretations of Article 2(7) has not been yielded by states to the political organs of the United Nations and that the power of auto-interpretation thus still rests with the member states.¹ At the outset it should be made clear that this argument is not based upon the proposition that one should adopt a positivistic approach to Charter interpretation generally. Rather it is argued that, although other articles may be amenable to alternate modes of interpretation, a positivistic approach is necessitated by the unique nature of Article 2(7) as the intersection of both law and politics on the one hand, and domestic versus international jurisdiction on the other. While it is clear that, to take the more optimistic view, the current trend in the practice of the political organs of the United Nations is toward a centralization of competence based upon consensus, the extent to which this political activity may be legally justified is minimal. This is so because, while one may adopt a dynamic approach toward lesser substantive rules, one cannot do so in connection with a principle that forms the basis for the overall allocation of competence within the system. To put it bluntly, one cannot use a dynamic

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¹ For a thorough analysis of the problem of autointerpretation generally, and the distinction between autodecision and autointerpretation in particular, see Gross, *States as Organs of International Law and the Problem of Autointerpretation*, LAW AND POLITICS IN THE WORLD COMMUNITY 59-89 (G. A. Lipsky, ed., 1953).

or teleological approach as the sole means of shifting from a system based on state consent² to one based on international consensus. A basic change such as this is beyond the control of legal theory; it must first be a political reality. Otherwise one produces a legal rule with no basis in reality, resulting in a loss of credibility for international law at all levels. Furthermore, as will be shown below, the techniques used to prove that the UN political organs are competent to interpret Article 2(7) either assume what is supposedly being proven or else require a drastic change in the basic concepts of international law, in particular as regards the formation of custom and the interpretation of treaties. It is not here being denied that the legal validity of this method of interpretation might rest on consensus at some future time, only that one cannot achieve that goal by arguing from the norms of international law, since they are based on a concept of sovereignty which is diametrically opposed to the idea of supranational authority.

THE ORGANIZATION'S AUTHORITY TO INTERPRET ARTICLE 2(7): BACKGROUND

Prior to the institution of international organizations, the concept of sovereignty clearly included the power of autointerpretation of international obligations and any departure from this was in itself due to an exercise of sovereignty on the part of the state in question. In other words, the requirement of consent was so complete that not only could a state not be bound by a rule of international law to which it had not consented but it could not even be bound by an external interpretation of its freely given obligations, unless it had surrendered the power to interpret the obligation in question to some other organ. A significant advance was made in the Covenant of the League of Nations in that Article 15(8),³ the precursor of Article 2(7), required that the determination of whether a matter was of domestic jurisdiction was to be made by the League Council. Furthermore the Council, in making that decision, had to apply the relatively objective standard of international law. After the collapse of the League, this power reverted to the individual states, and it is, of course, not possible to use Article 15(8) in any way as a precedent in analyzing Article 2(7) of the UN Charter, the latter being a subsequent and independent act of consent by sovereign states.

One of the most notable and most lamented aspects of Article 2(7) is the complete absence of any reference to an organ authorized to decide

² Consent is so basic to international law that Schwarzenberger describes it as being "coterminous with the existence of universal international law itself." Schwarzenberger, *The Fundamental Principles of International Law*, 87 REC. DES COURS 195 (I, 1955).

³ Article 15(8), the provision in the Covenant equivalent to Article 2(7), stated:

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

upon its applicability or to interpret it authoritatively. Yet this lacuna was clearly intentional. At San Francisco, despite the fact that "a majority of governments which commented on Chapter VIII(a/7) favored a more precise formulation of the provision, especially with a view to assuring a decision by the International Court of Justice,"⁴ the article as formulated contained neither a reference to any adjudicatory body nor mention of the standard of "international law." A proposal by the Greek Government that,

"It should be left to the International Court of Justice at the request of a party to decide whether or not such situation or dispute arises out of matters that, under international law, fall within the domestic jurisdiction of the State concerned."⁵

failed to receive the required two-thirds majority. Whether one sees this as being the product of a conscious desire to protect state sovereignty or the product of a trend away from international adjudication per se, the result is clear. A serious attempt was made to endow the International Court of Justice with the requisite power, and that attempt failed.

The possibility that the General Assembly might be given the power to make authoritative interpretations of the Charter was likewise raised at the drafting stage in a proposal by Belgium to the effect that the General Assembly should have "sovereign competence to interpret the provisions of the Charter."⁶ This proposal was referred to Committee IV/2 and also failed to be adopted.⁷ It is not suggested that these events during the drafting stage are dispositive of the issue. But what must continually be borne in mind is that, at a time when most nations of the world were at a high-water mark of cooperation, they balked at the idea of surrendering their power of autointerpretation. Consequently any attempt to show that they have subsequently done so will have to be exceedingly well founded in law.

The lacuna in Article 2(7) has been approached from divergent directions by many authors. With a few notable exceptions, there is an assumption among them that the lack of competence in the Organization is somehow the result of an oversight, a mistake, or even worse. Thought is seldom given to whether it is desirable from a political or legal perspective for the Organization to have such a power of interpretation. Instead there has been a headlong rush to "prove" that states have indeed surrendered that power regardless of the desirability or reality of this position. Most writers have made a fairly straightforward argument to the effect that the Organization must be able to interpret the Charter

⁴ Preuss, *Article 2(7) of the Charter of the United Nations and Matters of Domestic Jurisdiction*, 74 REC. DES COURS 553, 573 (I, 1949). (It should be noted that "Chapter VIII(a/7)" is Article 2(7) in its Dumbarton Oaks form.)

⁵ 6 UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, San Francisco, 1945, DOCUMENTS, 509 (hereinafter UNCIO Docs.). Seven other attempts are noted by H. LAUTERPACHT in *INTERNATIONAL LAW AND HUMAN RIGHTS* 182, n. 35 (1950).

⁶ 8 UNCIO Docs. 392.

⁷ 13 UNCIO Docs. 709-10.

authoritatively in order to carry out its functions in any meaningful way. Lauterpacht, for example, points out that the lack of an organ of interpretation is not peculiar to this article, that it is a common condition of the entire Charter, and that "the authority to decide upon disputed questions of interpretation of the Charter belongs, in principle, to the organ charged with its application."⁸ Reinforcement for this approach is to be found in the record at San Francisco, where it was generally assumed that each organ of the United Nations would interpret for itself the Charter as it related to its functions. The firmest basis for this is the often quoted report of the Rapporteur of Committee IV/2 which includes the following passage:

In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. It will be manifested in the functioning of such a body as the General Assembly, the Security Council, or the International Court of Justice. Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle.⁹

However, even if one were rash enough to treat the above statement as being authoritative, three arguments may be made against the conclusion that this means that authority has been transferred in connection with Article 2(7). Firstly, the Rapporteur is directing his remarks at "day to day" operations, which is a far cry indeed from legally binding interpretations on highly charged political issues. Secondly, this statement is obviously aimed at interpretations made by the organ for its own use. There is no mention here of the legal significance of such interpretations for a member state. Thirdly, there is no reason to resort to the preparatory work of a treaty unless there is some doubt as to how it should be interpreted, and there can be no doubt that the power of authoritative interpretation is not surrendered in the Charter, unless one is prepared to argue that the linguistic content of treaties no longer affects the obligations of states and organizations therein.¹⁰ It can hardly be expected that states would be encouraged in their acceptance of the rule of international law upon discovering that an amendment to a treaty which had been rejected by the original signatories could become binding on the strength of the very *travaux préparatoires* which contain the record of the amendment's defeat.

Other arguments in favor of supranational competence are more forthright. Alf Ross argues that "we must fall back on the generally recognized rule that an organ must itself decide the extent of its competence."¹¹ In reply to this a lawyer must ask among whom is this rule of interna-

⁸ H. LAUTERPACHT, *supra* note 5, at 181. ⁹ 13 UNCIO Docs. 709.

¹⁰ See text accompanying notes 30 & 31 *infra*.

¹¹ Ross, *The Proviso concerning "Domestic Jurisdiction" in Article 2(7) of the Charter of the United Nations*, 2 OSTERR. ZEIT. OFFEN. RECHT 562, 570 (1950).

tional law generally recognized and is it of sufficient weight to replace consent as the basis for allocating competence. Ross continues by saying that the idea of every state's having the right to establish what matters are domestic "would . . . be catastrophic."¹² But is legality to be determined solely by what is and what is not catastrophic in the eyes of commentators? On the contrary the power has not been given, and the result of this has not been catastrophic, because, by not permitting the United Nations to decide when a matter was one of domestic jurisdiction, Article 2(7) has made the United Nations a viable political institution, flimsy though it may be from a legal perspective. Other instances of such hortatory reasoning are not hard to find. For example Higgins' argument in favor of competence seems to boil down to saying that "the political organs of the United Nations have clearly regarded themselves entitled to determine their own competence."¹³ This, of course, merely begs the question.

More specifically the position that a state may decide for itself whether a matter is within its own jurisdiction is frequently met with an allusion to the maxim *nemo iudex in sua causa*. Yet it is just as much a violation of that principle for the Organization to make the decision as it is for the state concerned to do so, since the Organization is likewise an interested party. It is instructive to note that, of the writers who invoke this precept, most do so by applying it to the states members and not to the Organization. Not only does this manifest a weakness in analysis but it also shows that the commentators themselves are not without bias. In order to circumvent the problem of conflict of interest the decision would have to be made by the International Court of Justice. That is out of the question because, consistently with the consensual basis of international law, a state would have to consent to this jurisdiction in a clear and positive manner under the procedures set out in Article 36 of the Statute of the Court. Most states are unwilling to do so on such important issues. However, even when a state is willing to have the Court decide the matter, the Organization is not. During the discussion of the treatment of people of Indian origin in South Africa, a South African proposal to request an advisory opinion on the jurisdictional issue was rejected by a vote of 31 to 21, with 2 abstentions.¹⁴ A similar fate met a like proposal by Belgium during the Security Council's consideration of the Indonesian question.¹⁵ On the basis of these incidents Higgins

¹² *Id.*

¹³ R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 67 (1963). Other examples of such reasoning may be found in Bains, *State Sovereignty and International Jurisdiction: The United Nations Experience*, 3 INDIAN POL. SCI. R. 101 (1968-69); and Gilmour, *Article 2(7) of the United Nations Charter and the Practice of the Permanent Members of the Security Council*, [1967] AUSTRALIAN Y.B. INT. LAW 153.

¹⁴ 1(2) GAOR (52nd plen. mtg.) 1061 (1946). For the purposes of the discussion below in connection with customary interpretation of the Charter, the twenty-one negative votes are significant.

¹⁵ 2 SCOR No. 84 (195th mtg.) 2224 (1947).

concludes that it is for the organ concerned to determine the issue.¹⁶ On the other hand, one might also conclude that the political organs are well aware of the fact that the legal validity of their acts is highly questionable and that they have consequently chosen to avoid legal treatment of the issue of their competence.¹⁷

The proponents of UN competence should also reflect on the consequences that the adoption of this position would have for the Organization. The futility of arguing against state autointerpretation becomes obvious in light of the fact that the Organization has in most cases no legal basis for enforcing its decisions. If it cannot bind a member to carry out a resolution directed against it, then it serves no purpose to claim that it does have magisterial competence in interpreting Article 2(7), since the practical impact of the whole process is nil. Target states have not considered themselves bound by the subsequent resolutions, with the result that they have effectively retained the power of autointerpretation. Thus, insisting that the Organization is legally entitled to interpret Article 2(7) is tantamount to demonstrating that it is powerless, a position that contributes little to a nascent legal system.¹⁸

Furthermore, Leo Gross makes the point that, if the General Assembly had the power authoritatively to decide whether or not a matter was within a state's domestic jurisdiction, it would make no sense to release a member from the requirement to submit such domestic matters to settlement under the Charter, which is what Article 2(7) specifically does. It makes sense to release the members from submitting such matters only if the Assembly does not have the power to make that decision.¹⁹ As Kelsen put it, "this is one of the absurd consequences of the interpretation, compatible with the wording of the Charter, that it is upon the state concerned to decide for itself whether a matter is essentially within its domestic jurisdiction."²⁰ In support of this "absurdity," Gross refers to a passage from the Rapporteur of Committee IV/2 which, for reasons that are obvious, is rarely quoted by those advocating international competence:

It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not

¹⁶ R. HIGGINS, *supra* note 13.

¹⁷ For more detailed discussion of the problems of adjudication by the ICJ, see Gordon, *The World Court and the Interpretation of Constitutive Treaties*, 59 AJIL 794 (1965).

¹⁸ This is clearly the outcome of adopting Lauterpacht's rigid definition of "intervention" in Article 2(7) as meaning only "dictatorial interference." H. LAUTERPACHT, *supra* note 5, at 167-70. In any event, if only dictatorial interference were meant, there would be no need for the exception to the article which excludes its operation from Chapter VII enforcement measures, the only available instance of "dictatorial interference" in the Charter. Furthermore Preuss has made it adequately clear that the meaning intended was much broader. Preuss, *supra* note 4, at 583.

¹⁹ Gross, *Domestic Jurisdiction, Enforcement Measures and the Congo*, [1965] AUSTRALIAN Y.B. INT. LAW 137, 143.

²⁰ H. Kelsen, *THE LAW OF THE UNITED NATIONS* 783-84 (1951).

generally acceptable, it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter.²¹

Finally, the conclusion that sovereignty has not been surrendered in this area is consistent with the general pattern of the Charter. The General Assembly is not given any power to bind members substantively in any of the governing articles; neither is the Security Council except for its decisions under Chapter VII. But Article 2(7) specifically states that it does not apply to Chapter VII enforcement measures.²² Thus, the one area in the Charter in which the Organization is clearly competent legally to decide on the nature of an issue and to respond to it, is the one area to which Article 2(7) does not apply. If the Organization were competent to interpret and apply the phrase "domestic jurisdiction" generally, then the exception for Chapter VII would not have to be made.

The kernel of the problem is that the authority to interpret and apply Article 2(7) is a much more basic power than the authority to interpret any other article in the Charter. It involves the allocation of legal competence between the potentially supranational Organization on the one hand and sovereign states on the other. Article 2(7) was inserted in the Charter as a basic principle precisely to prevent the Organization from making this decision and to maintain the preeminence of the member states. Since it is the legal expression of the continuing political fact of sovereignty, its validity cannot be defeated by neat deductions from principles and rules of international law. The force of Article 2(7) is more a political than a legal matter, and it is this that necessitates a positivistic treatment and a continuing need to base any modification of the meaning of the article on the clear consent of states.

The position that the Organization is without competence as regards the authoritative interpretation of Article 2(7) is, of course, contrary to much current thinking, which is based on the proposition that the Organization is fully competent in this regard. However, to argue for this latter conclusion one must construct an approach to treaty interpretation that deviates substantially from the traditional legal one. The degree of success and overall desirability of such a venture are the next matters for consideration.

INTERPRETATION: TELEOLOGY VERSUS STRICT CONSTRUCTION

Most commentators, in approaching the "problem" of Article 2(7), operate on the basis of an unstated premise, namely that interpretation is a relevant issue. This is so widely accepted in the literature on the subject that the problems it entails are seldom discussed, and few writers seem to realize that their position is quite revolutionary in effect. Briefly, it is

²¹ 13 UNCIO Docs. 710.

²² The exception in the last sentence states, "... but this principle shall not prejudice the application of enforcement measures under Chapter VII."

assumed that there is something to interpret. That is doubtful to say the least, for Article 2(7) contains no language relating to the power of authoritative interpretation and this omission, as was seen above, was intended by the founders. Because it was an intentional omission, one may not adopt the argument that by interpretation one is attempting to find the true intent of the parties or the original shared meaning in this regard. Nor can one use the principle of effectiveness as a means of filling in the gap, since even Lauterpacht in his definitive essay on that topic was at great pains to point out that effectiveness cannot be used to displace the intent of the signatories or to go beyond the express provisions of the agreement. On this he says:

Moreover, it is idle to pretend that that particular presumption—that of effectiveness—follows invariably from the attitude usually adopted by states engaged in concluding treaties. Parties to treaties often wish their obligation to go so far and no farther. They—or some of them—desire the treaty to be only partly effective. They use language which, in their view, adequately expresses their determination not to concede to the treaty a full measure of realisation of all its inherent and potential purposes . . .

In particular, no principle of effectiveness can properly endeavour to give legal efficacy to clauses or instruments which were not intended to produce such results.²³

One must acknowledge that one is not interpreting Article 2(7) to find which body was meant to have the power to interpret it, but one is rather adding a completely new provision to it. The interpretative range undoubtedly shifts with the passage of time, but it is continually limited by the text. That is what the text is for. All of the aids to interpretation that seek to derive meaning from sources other than the legal documents before them presuppose that there is something to be interpreted, a verbal formulation concerning a duty, power, or obligation which is susceptible of more than one meaning. Should there be no reference to a legal relationship, then, there being nothing to interpret, the extrinsic aids may not be used to create one. This is basic to the entire philosophy of interpretation of legal documents, and it is especially relevant in a decentralized system such as that of international law. Were it otherwise, there would be no reason to put agreements into a verbal form, for treaties would have no function. It is not being suggested that one necessarily adopt a literal or plain meaning approach to interpretation generally—only that one require a verbal signal concerning a legal relationship before the process of interpretation can begin. Often there will be occasions when there is no such signal. On this basic point Judge Winiarski has sensibly observed:

The intention of those who drafted the [UN Charter] was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully established fields of competence . . . It may be

²³ H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BYIL 48, 73–74 (1949).

that the United Nations is sometimes not in a position to undertake action which would be useful for the maintenance of international peace and security or for one or another of the purposes indicated in Article 1 of the Charter, but that is the way in which the Organization was conceived and brought into being.²⁴

That really ought to be the end of the matter. There is no vagueness as to autointerpretation in Article 2(7), there is no confusion as to the intent of the parties, there is nothing unclear, and interpretation is thus simply not an issue. Nevertheless, interpretation has not been set aside by most writers as an approach to the article and the literature is replete with references to the *travaux préparatoires*, the "true" intent of the parties, subsequent practice, and general organization teleology. All of this supposedly proves that the Belgian amendment is really there after all.

Little attention seems to have been given to the fact that in a nascent legal system one must be continually conscious of the effect of a position upon the overall efficacy of the system. Indeed it is clear that in international law the efficacy of the system is more important than the substantive response to any particular issue. A cavalier treatment of the basic principle of consent, virtually the *Grundnorm* of international law,²⁵ under the guise of a dynamic interpretation of a Charter provision, brings into question the validity of the entire system without producing significant results. Since states do not in fact accept the Organization's assumption of competence, then the product of the teleological approach is, as often as not, a superficially attractive rule of law with no foundation in reality. Such a rule has no utility either as a descriptive or prescriptive device, and the entire system suffers accordingly. Only a degree of judicial and academic self-restraint leading to a strict interpretation of Article 2(7) is of any utility in connection with this single Charter provision.

The teleological or flexible approach appears in many forms. For example, it is frequently argued that one may adopt a dynamic approach to Charter interpretation because the Charter is a constitution and thus "should be interpreted not literally or rigidly as a contract or a statute might be in municipal law, but with flexibility so that the Organization may develop and be effective to fulfill its basic purposes."²⁶ The flaw here, of course, lies in the fact that in a domestic context a constitution may be flexibly interpreted because there is invariably a body which is generally accepted as having the authority to do so. This is not true in international law, and it is especially so in connection with the power to interpret Article 2(7), since the very issue is which legal entity is to have competence. Indeed, in applying the argument by way of analogy to constitutions to the interpretation of Article 2(7), one clearly has to assume what one is setting out to prove.

²⁴ Advisory Opinion on Certain Expenses of the United Nations, [1962] ICJ REP. 150, 230.

²⁵ Schwarzenberger indicates that it might be argued that consent is the fundamental principle of international law. *Supra* note 1, at 288-89.

²⁶ Vallat, *The Competence of the United Nations General Assembly*, 97 REC. DES COURS 234, 249. (II, 1957).

More common is the unabashedly straightforward approach which inevitably sounds very inviting and just as inevitably ignores completely any connection between law and political reality. An example of this is to be found in Higgins' influential treatment of UN law. She writes "[g]iven the mutable and developing nature of the concept of domestic jurisdiction, a flexible approach is desirable, based on the principle that the states must be made responsible to the international community when their actions cause substantial international effects."²⁷ While one may agree with the sentiments expressed, one can only respond as a lawyer by asking whence comes the principle that states must be made responsible in this manner. Is it a principle of sufficiently general acceptance that it may be regarded as a legal principle? And does it take precedence over a basic principle of the UN Charter, and if so why? Likewise, when was the objective "effects" approach accepted as the basis for the jurisdiction of the United Nations, and by whom? To these questions, Higgins provides no immediate answer, nor for that matter does she feel it incumbent upon herself to discuss the legal content of the word "must." If this word connotes legal compulsion then the argument has to go much further. If it does not connote legal compulsion, then the reader is free to agree or disagree with the entire statement.

Another frequent argument is that Article 2(7) is a "principle" of the Charter and therefore must be treated differently from other Charter provisions. Usually the argument runs that it is in the nature of legal principles to be vague and potentially applicable to an indeterminate range of events and that they must therefore be interpreted flexibly.²⁸ Again this view fails to take account of the problem of compliance or the lack of textual material that would justify this flexibility. Nor does it answer an argument which is just as tenable, namely, that, since Article 2(7) is a principle high in the Charter's normative hierarchy, it must be treated with greater caution and circumspection than one would accord to the lesser provisions.

Finally, it has been said²⁹ that a teleological approach to Charter interpretation has been used by the World Court and that one is consequently at liberty to do likewise with the domestic jurisdiction clause. However, if one examines the subject matter of the cases which are usually cited in this connection, one will find that the element of sovereignty was insignificant in comparison to the degree to which sovereignty enters into the general question of domestic jurisdiction. This is especially true of two cases, the *Reparations* case³⁰ and the *Administrative Tribunal* case,³¹ both

²⁷ R. HIGGINS, *supra* note 13, at 62.

²⁸ Schachter, *The Relation of Law, Politics and Action in the United Nations*, 109 REC. DES COURS 166, 191-98 (II, 1963).

²⁹ Vallat, *supra* note 26, at 284-85; D. NINCIC, *THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS* 326-32 (1970).

³⁰ Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, [1949] ICJ REP. 174. Here it was stated by the majority (at 180) that "under international law, the Organisation must be deemed to have those powers

of which concerned what can only be described as minor administrative matters. A third case adopting an approach looking to implied powers is not so easily dismissed. In the *International Status of South West Africa* case,⁸² a considerable amount of reading between the lines was done to establish General Assembly control over the mandated territory by way of Articles 10, 79, and 85 of the Charter. Yet even this case cannot be seen as substantial authority for the unbounded use of the purpose-oriented approach, since most states were relatively unconcerned about the consequences for them of the decision, due to the uniqueness of the problem. In any event the decision did not pose any direct threat to state sovereignty per se. South Africa did not consent at any time to this grant of authority and failed to give much heed to this and other similar decisions. If anything, the history of the South West Africa dispute only reinforces the view that it is futile to deduce that the United Nations has certain powers, when in reality it does not. The result is invariably a severe enforcement problem which can degenerate very quickly into a test of political strength, with the target state winning. Those who cite the *Status of South West Africa* case as an example of the principle of effectiveness apparently fail to trouble themselves with an assessment of the effectiveness of the decision itself or of its progeny. Thus, of the three cases most commonly cited for a teleological or implied powers approach to Charter interpretation, two were unimportant, and the third was unsuccessful.

A teleological approach is a most useful tool in interpreting less politically sensitive areas of international relations or in connection with organizations where consent may almost be presumed in advance, such as those in which Friedmann detected the "international law of co-operation."⁸³ Indeed a review of the work of the World Court indicates that it was with the archetypical functional organization, the International Labor Organization, that the implied powers technique was first conceived.⁸⁴ But it is surely plain to all but the most die-hard idealist that the use of this approach to transfer the power of defining domestic jurisdiction from states to a political organization will have no practical effect whatsoever except to increase the problem of credibility which international law is already experiencing.

which, although not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."

⁸¹ Advisory Opinion on Effect of Awards of Compensation made by the United Nations Administrative Tribunal, [1954] ICJ REP. 47.

⁸² Advisory Opinion on International Status of South West Africa [1950] ICJ REP. 138.

⁸³ W. FRIEDMANN, O. LISSITZYN AND R. PUGH, *CASES AND MATERIALS ON INTERNATIONAL LAW*, ch. 11 (1969). Yet even here the writers were constrained to say:

Insofar as the international law of co-operation is reflected in international agreements and treaties, it still leans heavily on the traditional structure of international society, under which sovereign states agree to undertake certain activities, but the execution of these activities remains within their sovereign power (at 1008-09).

⁸⁴ Gordon, *supra* note 17, at 816-18.

Theory must yield to reality because the problem of credibility that would be created affects not only the public perception of international law, but also, and much more importantly, those intangibles upon which legal systems rely so heavily for obedience. Since we have not yet reached a point where international law has a centralized magisterial organ that can prescribe what is best for all and since we have no sanctions in the traditional sense, these intangibles are of paramount importance. They include the habit of obedience, the acceptance of the long-range benefits of order as opposed to chaos, the sense of security presented by predictable and reasonably stable norms, the realization that law is based on consensual reciprocity, and so forth. It is international law's inevitable reliance on these intangibles that dictates a very careful approach to the interpretation of this particular Charter provision and one would be well advised to adopt the classical positivistic doctrine of the Permanent Court of International Justice in the *Lotus* case:

The rules of law binding upon states . . . emanate from their own free will as expressed in conventions . . . restrictions upon the independence of states therefore cannot be presumed.⁸⁵

The validity of this statement lies not in the fact that it was uttered by the Permanent Court, but rather in the fact that it recognizes the inherent limits on the prescriptive range of international law when faced with sovereign power.

One final point against the teleological approach is in order, and it is a very important one. If one reads Article 2 in its entirety, one will see that the Charter itself prohibits the use of a purpose-oriented approach to the interpretation of Article 2(7). That attention needs to be drawn to this fact is a sad reflection on the current state of commentary on the Charter.

The teleological approach stresses the overall purposes of the United Nations and of the Charter. These purposes are to be found in Article 1 which makes clear mention of such items as the maintenance of peace, development of friendly relations, achievement of international cooperation, and so forth. It would doubtless be concluded that it would best serve the purposes of the United Nations if the power to interpret Article 2(7) were put in the hands of the General Assembly. The flaw in this approach is that Article 1 and its purposes is not superior to Article 2 and the principles therein. Rather the reverse is true for Article 2 states quite clearly in its first sentence that its principles are not subject to teleological review: "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. . . ." One cannot get a clearer refutation of the teleological interpretation of Article 2(7) than that.

THE ROLE OF PRACTICE: DYNAMISM VERSUS CONSENT

The practice of the United Nations organs has for some time now been the most important tool in the attack on Article 2(7). It has been used time and time again by writers as a means of showing that either the

⁸⁵ "Lotus," [1927] PCIJ ser. A, No. 10, at 18.

General Assembly does have the power to interpret and apply the domestic jurisdiction clause, or else that there is now a roughly definable area of state activity to which Article 2(7) clearly does not apply, namely anything of "international concern." Of the former contention, with which we deal first, the following quotations are representative:

The final decision in such cases would have to be made by the United Nations rather than the member concerned. The practice of the United Nations . . . overwhelmingly supports such a position.³⁶

The subsequent practice of the United Nations tended to dispel the misgivings of those who, like Kelsen, feared that the text, which was finally adopted at San Francisco, might result in the parties themselves deciding as to the applicability of the domestic jurisdiction clause.³⁷

Usage and precedent in political organs develop into legal rules—that is to say into norms which are accepted as legally binding by the vast majority of the states.³⁸

As far as the practice of the United Nations is concerned the above statements are completely accurate, for the Organization has followed Lauterpacht's suggestion, and the organs have without the slightest hesitation simply assumed competence. The issue is almost never separately discussed, the preliminary question of competence being merged with the merits of the case. By 1959 Vallat, in reviewing the history of the practice, could say:

In none of the twenty-five cases [in which an objection was raised on the basis of domestic jurisdiction] has the General Assembly, or the Security Council, decided that the subject was beyond its competence by virtue of Article 2(7).³⁹

On the basis of this uniform practice, many writers conclude that there is now no question about the Organization's competence. The vast majority of commentators agree that a legally binding rule has been created by consistent practice. But here again one would do well to examine more closely the legal problems in the relationship between the basic principles of international law and this new technique of using the practice of an organ constituted by a multilateral treaty as the foundation for new rules of law. The answer is not immediately satisfactory and one must do more than allude to "collective legitimization" to bridge the gap between politics and law, for even Claude, who introduced the idea, clearly regards it as being a purely political, nonlegal function of the UN organs.⁴⁰

There are two possible approaches. One may argue that the practice of the Organization is relevant as a means of interpreting the document itself (subsequent practice), or else one may argue that the practice is significant independently of the specific language of the text, being evidence of what is accepted by states as law (custom). The argument directed to subsequent practice is the weaker of the two in that, as was

³⁶ Bains, *supra* note 13, at 109.

³⁷ D. NINCIC, *supra* note 29, at 182.

³⁸ R. HIGGINS, *supra* note 13, at 4.

³⁹ Vallat, *supra* note 26, at 233-34.

⁴⁰ I. CLAUDE, *THE CHANGING UNITED NATIONS* 73-104 (1967).

mentioned above, there is nothing to interpret and consequently the status quo ante prevails. That interpretation of nonexistent provisions by means of subsequent practice is not a legitimate undertaking is such a basic proposition that it is hard to find any authority for it. Should one be prone to interpret the Charter in this manner, however, one should note that the Vienna Convention on the Law of Treaties, while permitting account to be taken of subsequent practice, puts at the core of interpretation the "ordinary meaning to be given to the *terms* of the treaty in their context and in the light of its object and purpose" (emphasis added).⁴¹ No mention is made there or anywhere else of interpreting what one wishes were there or what is pointedly absent.

What is obviously being done with Article 2(7) is the creation of a provision de novo, and it is thus custom that is the proper basis for the argument. Should one still wish to maintain that there is a role for invoking the Organization's practice in aid of the interpretation of Article 2(7) in this regard, one would do well to consider the problems in the use of custom outlined below, for both custom and treaties are based squarely on state consent, and if consent proves to be a problem in the one case then it is just as much a problem in the other.

The "customary interpretation" argument is widespread and tends to run as follows: the meaning of any given provision in the Charter or of the Charter as a whole may be found in the practice of the UN organs, and this practice becomes valid international law on the basis of customary acceptance regardless of the specific provisions in the Charter, the *travaux préparatoires*, or the real or presumed intent of the original signatories. What is usually lacking in the argument is an analysis of the relationship between usage and custom and of the mechanism whereby usage becomes custom. This is a particularly unfortunate omission since the United Nations is primarily a political organization and consequently the motivation for much behavior there is ad hoc or political, and thus not susceptible of systematic treatment to the degree necessary for the establishment of customary international law. It may be that much of the Organization's practice is usage pure and simple, governed only by political expediency. If this were so, it would be a very great disservice to international law to adopt it as lawcreating without further reflection. One should also maintain an open mind to the possibility that some of this practice may be totally illegal or ultra vires, in which case its adoption as law becomes quite bizarre.

Perhaps the most widely read exponent of this approach is Higgins, who writes in the introduction to her book on UN practice that:

The United Nations is a very appropriate body to look to for indicators of developments in international law, for international custom is to be deduced from the practice of states . . .

Seventeen years' work by the United Nations has provided us with an important new source of customary international law.⁴²

⁴¹ Vienna Convention on the Law of Treaties, Article 31. UN Doc. A/CONF. 39/27, 63 AJIL 875 (1969).

⁴² R. HIGGINS, *supra* note 13, at 2 & 10.

In her subsequent treatment of UN practice, the basic problems referred to above are never adequately dealt with. While she admits the difficulty of distinguishing between usage and custom, she speaks freely, as do many others, of "consensus" and "the majority" as the basis for her subsequent conclusions. Of course there is no majority rule in the creation of international customary law. Quite apart from the elusive psychological element of *opinio juris*, a usage fails to become a universal rule when states protest:

Those parts of conflicting claims and practices in respect of a particular matter which are common to all of the claimant States and have encountered no protests are . . . the acceptable *residuum* of the practice or claim which is apt to attain the status of custom.⁴³

MacGibbon's definition, above, acknowledges the fact that the creation of a customary rule is on the borderline of the descriptive and prescriptive functions and that consequently account must be taken of the fact that a state has protested. In customary law, a state may not be bound against its will, since to do so would either violate the sovereignty of that state or, more importantly for our purpose, create a norm that is less than universal and potentially ineffective when put to the test.

Putting this in the context of UN practice, one can immediately see the problem. A state that votes against a resolution on the ground that the resolution infringes upon its domestic jurisdiction or that of another state is quite clearly protesting the exercise of authority in that regard by the Organization. Thus the resolution in question, while it might be binding on those states that voted in favor of it, cannot be said to create a rule of customary law, especially a rule of customary law binding upon the objecting target state. Likewise, other states voting negatively cannot be said to have acquiesced in the general proposition that in such instances the Organization is competent. To this the advocates of the customary approach would doubtless reply that over a period of time, as a result of many resolutions, a core of customary law is distilled. But this does not deal with the problem; it simply puts it out of focus by diverting attention away from the issue of consent.

For example, if one examines the resolutions of the General Assembly adopted in the face of an objection on the ground of domestic jurisdiction,⁴⁴ one immediately notices that not only does the state that is the object of the resolution vote negatively, but there is almost always a significant sympathetic minority voting against UN action. During the debates on the Spanish question, the voting on Resolution 39(I)⁴⁵ was 34 to 6 with 13 abstentions.⁴⁶ Not including the abstentions, which could be interpreted as acquiescence, this means that 10% of those voting voted against

⁴³ I. MacGibbon, *Customary International Law and Acquiescence*, 33 BYIL 115, 119 (1957).

⁴⁴ This is easily done by consulting 1 REPERTORY OF PRACTICE OF THE UNITED NATIONS ORGANS 55-159 (1955) and 1 *id.*, Supp. I, 25-71 (1958).

⁴⁵ G.A. Res. 39(I), Dec. 12, 1946.

⁴⁶ 1(2) GAOR (59th plen. mtg.) 1222 (1946).

the resolution. Likewise six negative votes were cast on Resolution 285 (III)⁴⁷ in the Russian Wives question. But the six nations which voted against Resolution 39(I) (Argentina, Costa Rica, Dominican Republic, Ecuador, El Salvador, and Peru)⁴⁸ are not the same six that voted against Resolution 285(III), (Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, USSR, and Yugoslavia). Thus, in just these two resolutions out of dozens of similar ones, a total of twelve nations (20%) voted against UN action. By investigating Resolution 44(I),⁴⁹ adopted during the discussions on the treatment of people of Indian origin in South Africa, one can add eleven more nations to the group that have voted negatively when domestic jurisdiction was an issue: Belgium, Canada, Greece, Luxembourg, the Netherlands, New Zealand, Nicaragua, Paraguay, South Africa, the United Kingdom, and the United States. On the basis of just these three resolutions, 41% of the membership (as of 1948) had voted negatively. Nor does this even begin to exhaust the possibilities since the *Repertory of Practice* lists, for the first twelve years of the Organization, a total of eighteen instances of objection to General Assembly competence and thirteen to that of the Security Council. An additional nine cases are listed in the Annexes in which competence was exercised by the General Assembly without any discussion of domestic jurisdiction objections.⁵⁰ Furthermore included within these cases are instances of votes against UN action such as Resolution 814(IX)⁵¹ on the Cyprus question, which passed by 50 votes to 0 with 8 abstentions.⁵² Other examples of inaction may be found on the questions of West Irian, Algeria, and others. In short, the sweeping claims concerning the subsequent practice of the UN organs do not seem to be so sweeping when viewed from the point of view of the behavior of the individual states in the early history of the United Nations.

While this collection of material only covers the first twelve years of operation of the Organization, it represents a total of 40 instances in which a target state specifically objected to the Organization's activity during a period when the political organs were not playing a particularly dynamic role, as compared to the subsequent actions in the Middle East, the Congo and, more recently, the escalation of pressure on Rhodesia and South Africa. Moreover this was approximately the period that Higgins was using as the basis for her conclusions. It is submitted that, in a legal system based primarily upon consent, the above objections are more relevant to the question of customary law than the juggernaut consistency of ineffective resolutions. Those who adopt the method of interpreting the Charter in the present context by reference to subsequent practice, in-

⁴⁷ G.A. Res. 285(III), April 25, 1949.

⁴⁸ Information on voting by individual states is from D. J. DJONOVICH, *UNITED NATIONS RESOLUTIONS, SER. I, GENERAL ASSEMBLY*, (vols. 1 and 2, 1973).

⁴⁹ G. A. Res. 44(I), Dec. 8, 1946.

⁵⁰ 1 *REPERTORY*, *supra* note 51, at 157-59; 1 *id.*, Supp. I, at 70-71.

⁵¹ G.A. Res. 814(IX), Dec. 17, 1954, 9 GAOR, Supp. (No. 21) 5, UN Doc. A/2890 (1954).

⁵² 9 GAOR (514th plen. mtg.) para. 268 (1954).

variably place too much emphasis on the Organization's assumption of competence and not enough on either state practice or the degree to which the Organization affects state actions.

Having established that it is perfectly possible for the practice of an organ to be consistent with only a minority of members voting consistently, the remaining votes in each majority decision being made up of a constantly changing group of countries voting on the basis of extralegal factors, it is now necessary to turn to the motivations of states.

It is perfectly obvious, even from the brief survey of voting above, that the motivation of states to vote for or against a resolution is not purely legal. A simplistic approach to custom based solely on UN practice fails to filter out those instances when votes are cast not because of a belief in the correctness of a proposition from a legal perspective, but because of ad hoc political factors. Under the prevailing theory of custom as a basis for international law such instances as the latter are not relevant, because they lack *opinio iuris*—that there must be a "conception that the practice is required by, or consistent with, prevailing international law."⁵³ The inconsistency and high political content of the practice of the Organization's organs are such as to render it completely useless as a source of law. One might well expect the International Court of Justice, if it were ever unfortunate enough to face this question squarely, to allude to its decision in the *Asylum* case, wherein it stated:

The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction . . . and the practice has been so influenced by considerations of political expediency . . . that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule . . .⁵⁴

A further problem with the use of custom in this context is that it relies on the use of votes and not actual practice for the material element. The value of practice as opposed to voting is that it entails a solid commitment by a state to a proposition and actual involvement, both of which are entirely lacking in all but the most important votes in the United Nations. Most votes are unlikely to reflect a state's commitment to an action as generally legal since there is no element of involvement beyond the mere vote. It is a vicarious activity untrammelled by the need for accommodation, reciprocity, or consistency. This accounts for the widespread inconsistency in the positions taken by national delegations on identical issues, a point often lamented. Nor can one consider the practice (resolutions) of the political organs as being the material element of customary law since they do not by any means reflect what happens, only what is hoped will happen. Thus the use of the practice of an international organ as the basis for customary law requires, to a substantial extent, that we dis-

⁵³ UN Doc. A/CN.4/16. Working Paper by Manley O. Hudson in [1950] 2 Y.B. INT. LAW COMM. 24, 26, UN Doc.A/CN.4/Ser.A/1950/Add.1.

⁵⁴ *Asylum* case [1950] ICJ REP. 266, 277. The Court's philosophy regarding the motivation of states in the formation of customary law has remained consistent, see the *North Sea Continental Shelf* cases [1969] ICJ REP. 3, 41-45.

pense with both the traditional elements of custom, *opinio iuris*, and actual practice.

While the International Court of Justice has never been squarely faced with the question of a "customary interpretation" of Article 2(7), its jurisprudence shows, in the words of one writer, that as to subsequent practice it "is uncomfortable with the criteria it presently uses to determine the legal propriety of such recourse."⁵⁵ The same writer, in reviewing the Court's response to subsequent practice as it affects constitutive treaties, stated that the Court "has been unwilling to go so far as to lend its support to the concept of 'novation'—i.e., a new agreement inferred from the behavior of the parties and superimposed on the written text of a compact."⁵⁶ Furthermore, an awareness has been shown of the sleight of hand involved in sliding from state practice to the practice of an organ:

I find difficulty in accepting the proposition that a practice pursued by an *organ* of the United Nations may be equated with the subsequent conduct of the *parties* to a bilateral agreement and thus afford evidence of intention of the parties to the Charter . . . and in that way or otherwise provide a criterion of interpretation. Nor can I agree with the view sometimes advanced that a common practice pursued by an organ of the United Nations, though *ultra vires* and in point of fact having the result of amending the Charter, may nonetheless be effective as a criterion of interpretation . . .

[There is], I believe, no authority, at least none of any weight, for the proposition that the practice followed by an *organ* of the United Nations may be equated with the subsequent practice of the *parties* to a treaty.⁵⁷

Thus, unless one is prepared to put the theoretical basis of international law on a footing other than consent, unless one is prepared to advocate the legality of majority rule on its own merits, one must reject the idea that custom has a role to play in the political organs of the United Nations. Since we are still dealing with sovereign states which base their activity on consent, objections cannot be ignored. This is especially true in this connection since the objecting state is almost invariably the target state. Consequently, it is fruitless to describe a consistent practice of the General Assembly or Security Council as creating international law. To do so would be to assume the surrender of sovereignty, which is the very question posed in any analysis of Article 2(7).

INTERNATIONAL CONCERN VERSUS INTERNATIONAL JURISDICTION:

Ex Injuria Ius non Oritur

The previously noted tendency of the General Assembly and the Security Council to gloss over lightly questions of their constitutional authority and their marked avoidance of a legal approach in favor of a more flexible,

⁵⁵ Gordon, *supra* note 17, at 832.

⁵⁶ *Id.* at 831.

⁵⁷ Separate Opinion of Judge Sir Percy Spender, Advisory Opinion on Certain Expenses of the United Nations, [1962] ICJ REP. 151, 189 & 195.

political one is probably most obvious in the emergence of an important addition to the Charter which came about in the same manner as the assumption of the power to interpret Article 2(7). This is the criterion of "international concern," the presence of which supposedly excludes the entire question of domestic jurisdiction. This concept is nowhere to be found in the Charter and its effect runs completely counter to the guaranty embodied in Article 2(7). The notion of matters of "international concern" is a development unique to UN practice since, although Article 11 of the Covenant of the League of Nations states that "any war or threat of war . . . is hereby declared a matter of *concern* to the whole League" (emphasis added), it is clear that "in League practice, however, there was a distinction between concern and jurisdiction."⁵⁸ An awareness of this important distinction between "concern" and "jurisdiction" is entirely lacking in most treatments of the bearing of international concern on domestic jurisdiction. The former is a political concept, the latter is a legal one. Consequently, it does not follow that what is of international concern is not of domestic jurisdiction. If that were the case and the two were mutually exclusive, there would be no problem. But the acceptance of the political concept as controlling the legal one means in effect that the latter is no longer treated with the uniformity and predictability that one tends to associate with law, or at least with the legal ideal. Obviously many more matters may be of international concern than of international jurisdiction, and as a result this substitution of "concern" for "jurisdiction" as the complement to domestic jurisdiction has created a concept of unparalleled scope and ambiguity. Indeed, Leo Gross has concluded in passing that "as a result the area of matters covered by Article 2(7) has been reduced to the vanishing point."⁵⁹

It was during consideration of one of the first matters presented to the United Nations, the Spanish question, that the process of modifying the Charter's provisions through the manufacture of the concept of international concern began. There can be no doubt that the creation of this concept was directly related to a very strong desire to subvert the Franco regime, the chief remnant of the political philosophy against which the United Nations was united. While the political basis for this may be defended, the legal basis, under prevailing legal theory, is not so easily discerned.

The Polish delegate to the Security Council charged that the activities of the Franco regime were "causing international friction and [presented] a serious danger to international peace and security,"⁶⁰ because Spain was maintaining a standing army of close to 700,000 troops, had massed forces along the French border, and had thus "compelled" the French Government to close its frontier with Spain. Inasmuch as the charges

⁵⁸ Howell, *Domestic Questions in International Law*, 48 ASIL Procs. 90, 93 (1954).

⁵⁹ Gross, *supra* note 19, at 140.

⁶⁰ 1 SCOR, 1st Ser., No. 2, (34th mtg.) 154 (1946). Ample materials on this question can be found in L. SOHN, *CASES ON UNITED NATIONS LAW* 290-320 (2d ed., 1967).

were phrased in the terminology of Chapter VI, the task of the Security Council seemed relatively simple; it could have declared that the matter was within Spain's domestic jurisdiction, thereby precluding action under Chapter VI but not enforcement measures under Chapter VII, or it could have found that it was not within Spain's domestic jurisdiction, thereby justifying general UN intervention. The Security Council appointed a subcommittee to examine whether the question was a domestic one. In its final report, the subcommittee found that:

The Security Council cannot, on the present evidence, make the determination required by Article 39. No breach of the peace has yet occurred. No act of aggression has been proved. No threat to the peace has been established. Therefore, none of the series of enforcement measures set out in Articles 41 and 42 can at the present time be directed by the Security Council.⁶¹

In other words, any contemplated action would have to be taken under Chapter VI, to which Article 2(7) applied. Therefore, if it was considered that the question was essentially one of domestic jurisdiction, no action could be taken at all. The subcommittee implied, however, that it might be possible for a matter to be removed from the domestic sphere because of its international ramifications. In the process of so doing, the subcommittee introduced the somewhat redundant characterization of a "potential menace" to the peace.⁶² Thus the all-important distinction between Chapter VI situations and Chapter VII threats to the peace was effectively obliterated, and with it the domestic jurisdiction clause, by means of shifting from a legal analysis of "international jurisdiction" as opposed to "domestic jurisdiction" to a political analysis of "international concern" as opposed to "domestic concern."

In the subsequent Security Council discussion, it was accepted that the matter was of an essentially domestic nature, but on the basis of the Rapporteur's interpretation of the subcommittee's report it was further accepted⁶³ that it ceased to be essentially domestic because it constituted a potential threat to the peace. While the Security Council failed to act because of a Soviet veto,⁶⁴ a similar resolution was approved in the General Assembly by a vote of 34 to 6 after a debate which included frequent references to the spirit of the Charter and the expectations of "peace-loving" peoples, and in which the question of domestic jurisdiction was largely avoided.⁶⁵

Higgins sums up the effect of the Spanish question by saying that,

What seems to emerge . . . is that the element of "international concern" which may fall short of a finding, express or implied, under Article 39, may none the less provide a sufficiently international char-

⁶¹ 1 SCOR, 1st Ser., Spec. Supp. 4 (1946).

⁶² *Id.* 5-6.

⁶³ With two notable exceptions; the United Kingdom and the Netherlands.

⁶⁴ The USSR vetoed the resolution on the grounds that it did not go far enough and that action under Chapter VII was called for.

⁶⁵ 1(2) GAOR (59th plen. mtg.) 1222 (1946).

acter to remove it from the operation of Article 2(7), and permit action under Chapter VI.⁶⁶

Just as with respect to the competence to interpret Article 2(7) authoritatively, we are here dealing with an addition to the Charter of prodigious proportions. The discussion above of the relationship between custom and subsequent practice points to the conclusion that in the treatment by the United Nations of the Spanish question there were sufficient objections by members to preclude the creation of any generally binding legal rule. As already mentioned, six negative votes were cast in the General Assembly and in the Security Council two members consistently opposed the "repercussions" approach to the question. The Netherlands stated categorically that the nature of a political regime in a country is "indisputably a matter of domestic jurisdiction."⁶⁷ The United Kingdom noted that there was no evidence that the Franco regime was really threatening international peace and security and subsequently warned against the tendency to drift away from the letter of the Charter, saying that the United Kingdom had

grave doubts indeed as to the juridical right of the Security Council to intervene in the internal affairs of a country unless there is a clear threat to the maintenance of international peace and security. We should be creating a precedent, and it is clearly essential that the United Nations should act on a perfectly sound legal basis.⁶⁸

This approach was, of course, ignored not only in the handling of the Spanish question but in other subsequent cases, effectively extending the scope of the exception in Article 2(7) to cover not only all phases of Chapter VII but also the entire operation of Chapter VI. But the mere fact that a particular position wins the largest number of votes in the UN political organs does not make that position legally valid. It is simply a political fact which may or may not have legal significance.

Finally, Resolution 386(V), passed by a similarly healthy majority in 1950,⁶⁹ revoked Resolution 39(I). This could be interpreted as either the result of a legal decision by the Assembly that the internal affairs of a nation are not of international concern after all, or else the result of a realization that the entire process was futile. Whatever the motivation of the Assembly in passing Resolution 386(V), one is entitled to expect an analysis of its legal implications in the writings of those who advocate a legal conception of matters of international concern.

The approach based on the repercussions of a situation made during the first session of the Assembly continued during the discussion of the "Treatment of Indians in the Union of South Africa." In the third session of the General Assembly, the Indian delegate said that the situation, if it was allowed to continue "would become a potential threat to the peace,"⁷⁰

⁶⁶ R. HIGGINS, *supra* note 13, at 80.

⁶⁷ 1 SCOR, 1st Ser. No. 2 (34th mtg.) 176-77 (1946).

⁶⁸ *Id.* (46th mtg.) 345.

⁶⁹ 5 GAOR (204th plen. mtg.) para. 124 (1950).

⁷⁰ Cited in Howell, *The Commonwealth and the Concept of Domestic Jurisdiction*, 5 CAN. Y.B. INT. LAW 14, 28 (1967).

thus adding potential potentiality to potentiality as an available rationalization for dispensing with the "legalisms" of the Charter.

During the handling of the Indonesian question, the cavalier treatment of Article 2(7) continued, and the openness and ambiguity of the concept of international concern may be seen in the following statements by delegates. The United States delegate dismissed the whole question of competence by saying:

there is shooting and men are being killed . . . Thus it is a legitimate concern of the Security Council, no matter what concept of sovereignty is involved, or what may ultimately be decided to be the fact.⁷¹

The United Kingdom position, in marked contrast to the stand taken during discussion of the Spanish question, was that "the situation is one which might conceivably at any time endanger international peace and security" and that the Security Council was therefore competent to deal with the situation "not as a dispute between the Netherlands and the Indonesian Republic, but because the fighting in progress may well create a situation leading to international friction,"⁷² thus sidestepping the entire issue of whether in fact the constitutional ties between Indonesia and the Netherlands were such that the former was indeed a domestic problem of the Netherlands. Finally, at a later stage of the Council's consideration of the Indonesian question, the Indian delegate suggested that the dispute between Indonesia and the Netherlands could not be regarded as domestic in view of the fact that it had "forced nineteen different countries in Asia and the Pacific to meet at very short notice and to pass a unanimous resolution indicating the gravity of the situation."⁷³ Thus, although there were substantial indications that the situation may well have been a domestic matter, the competence of the United Nations was assumed without a finding under Article 39 and in the face of a plea of domestic jurisdiction.

Gradually the frequency of references to international concern or international repercussions increased, especially in connection with matters of human rights and self-determination, until the phrase had a ring of authenticity to it. By the time of the Rhodesian question, the international repercussions argument was routine and, despite protests by the British Government that the affair was domestic, four resolutions were passed⁷⁴ which emphasized the "potentially explosive" nature of the situation without any prior rational inquiry into the possible validity of the British claim. And during the early stages of the Congo question a Pakistani delegate declared that all the proposals before the Council involved some kind of interference in matters which would normally be regarded as domestic

⁷¹ 2 SCOR, 1st Ser. No. 68 (172nd mtg.) 1657-58 (1947).

⁷² *Id.*

⁷³ 4 SCOR, 1st Ser. No. 7 (403rd mtg.) 3 (1949).

⁷⁴ G.A. Res. 1747(XVI), June 28, 1962, 16 GAOR, 2 Supp. (No. 17/A) 3, UN Doc. A/5100/Add.1 (1962). G.A. Res. 1755(XVII), Oct. 12, 1962, 17 GAOR, Supp. (No. 17) 37, UN Doc. A/5217 (1962). G.A. Res. 1760(XVII), Oct. 31, 1962, *id.* 38. G.A. Res. 1889(XVIII), Nov. 6, 1963, 18 GAOR, Supp. (No. 15) 46, UN Doc. 5515 (1963).

and called for an end to the "spurious respect still shown to the letter of the Charter as it is understood at normal times."⁷⁵ This last remark really focuses the issue as being once more whether to adopt a dynamic, teleological approach with the emphasis placed on the goals of the United Nations, or whether to maintain the position that the primary source of law is to remain in written documents interpreted in good faith and in accordance with accepted techniques of interpretation. For reasons that have been discussed in the preceding sections, the latter approach must be taken to be the meaning of the domestic jurisdiction clause. The advocated meaning so far exceeds the reasonable range of meaning of the Charter as to remove any vestige of predicability from the use of the written document. The teleological approach presupposes a validly constituted organ to make the decision and this approach is in itself not a matter of interpretation, but one of novation, to which there has been a significant number of objections.⁷⁶ Furthermore, how do those who support the legitimacy of the concept account for those situations in which the United Nations did not act? How, for example, can one explain in terms of international concern or international repercussions why the United Nations dealt with the civil wars in Lebanon in 1958 and the Congo in 1960, yet chose to overlook the wars in Burma, Malaya, Nigeria, Vietnam, and the current situation in Lebanon. If one is truly concerned with the lawmaking effect of subsequent practice then those occasions on which no action was taken by the Organization are just as significant as those in which action was taken.

But perhaps the most disturbing aspect of the treatment of domestic jurisdiction is that it is without question the result of antagonism to the law of the Charter on the part of the members. It would be strange indeed to give legal recognition to a rule which has as its basic premise that the Charter may be systematically ignored. If, as is so frequently claimed, the use of international concern as a basis for jurisdiction is now a valid rule, then all that is required is an amendment to the Charter.⁷⁷ If such an amendment is not forthcoming it is indicative of the fact that the international legal system is not as advanced as many would have us believe, and as lawyers we should take this reality into consideration. The true test of the continuing validity of Article 2(7) is to be found not in the arguments in the legal literature or in the debates of the General As-

⁷⁵ 16 SCOR (941st mtg.) 61 (1961).

⁷⁶ An excellent example is to be found in the remarks of the Yugoslav representative during the Security Council debate on the Greek Frontier question:

The authors of the Charter established a distinction between two kinds of procedure: that provided for by Chapter VI and that provided for by Chapter VII. In drawing up the measures contained in Chapter VI, they took special care not to restrict the sovereignty of States. It was only in connexion with a serious situation that they thought fit to restrict this sovereignty . . .

I think, gentlemen, that you will detract greatly not to say entirely from the moral value of your decisions if you do not take into account this difference between the Chapters of the Charter . . .

Quoted in SOHN, *supra* note 60, at 340-41.

⁷⁷ Facing the reality of the situation, Messrs. Clark and Sohn suggest that Article 2(7) be made inapplicable to Chapter VI disputes in their proposed revised Charter. CLARK AND SOHN, *WORLD PEACE THROUGH WORLD LAW* 105-06 (3rd ed. 1966).

sembly and the Security Council but rather in the behavior of states that are the unwilling targets of UN resolutions and have objected on the basis of domestic jurisdiction to any form of supranational intervention. When these states begin to comply with the Organization's resolutions against their political interests and because of a feeling that they must comply, then Article 2(7) will truly have been made redundant. Until then:

The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute a limitation on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.⁷⁸

CONCLUSION

Attacking Article 2(7) is an unproductive endeavor, as it is only a symbol of sovereignty and not sovereignty itself. Arguing for a supranational jurisdiction on the basis of the rules and principles of international law is doomed to failure since international law and supranational law are distinct legal systems which derive their validity from different bases, the former from the concept of the legal equality of states, and the latter from the idea of the ultimate unity of the legal systems of the world. These two basic philosophies may almost be regarded as the *Grundnorms* of the respective systems, and consequently what is valid in one system is not necessarily valid in the other. Until the basis for supranational authority is accepted independently, one must make do with international law and respect its inherent limitations. The fact that it might be possible to set up supranational authority by way of the consent of sovereign states does not justify the misuse of international law theory in an attempt to achieve it prematurely. Indeed, an undeniable effect of such an attempt would be to make it plain to the subjects of the system that the international rule of law in the broad sense is not a rule of law at all but a facade for monistic idealism. It is indeed curious that those who advocate a supranational legal authority frequently do so by disregarding the legal strictures of the existing system, thus effectively showing their lack of faith in the very technique that they are advocating as a means of solving the world's problems.

If international law were a cause and not an object of sympathetic and detached study, no greater disservice could be rendered to it than by the advocacy of short cuts to world order which are predestined to failure and whose only objective function is to be abused for ideological purposes.⁷⁹

⁷⁸ Conditions of Admission of a State to Membership in the United Nations [1947-48] ICJ REP. 57, 64.

⁷⁹ G. SCHWARZENBERGER, *THE INDUCTIVE APPROACH TO INTERNATIONAL LAW* 61 (1965).

REGIONAL ARRANGEMENTS IN THE OCEANS

*By Lewis M. Alexander **

The techniques of ocean management are in a process of continuing and accelerating change as new countries emerge into independence and as new perspectives are adopted toward the control and use of the ocean environment. Two decades ago, as preparations were underway for the First Law of the Sea Conference,¹ all of the ocean space, save for narrow bands of coastal waters, was conceived of as high seas, open to the use of all countries. Little attention was paid to the differences in marine interests and capabilities of the then nearly ninety independent coastal and land-locked states. The preeminence of the major maritime powers and their insistence on maximizing the freedom of the seas meant that few concessions to the special needs and concerns of the less-developed countries were even considered. Freedom of navigation, overflight, fishing, and scientific research beyond narrow territorial limits were major blocks upon which the law of the sea of the latter 1950's was constructed.²

Two decades later, events both within and outside the framework of the Third Law of the Sea Conference (UNCLOS III)³ attest to the changed dimensions of ocean management. For one thing, the traditional freedoms of the high seas face an unclear future. Many coastal states have extended the breadth of their territorial claims to twelve miles or more.⁴

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¹ At the First Law of the Sea Conference, which was held at Geneva from February 24 to April 27, 1958, 86 delegations were in attendance. Four Conventions containing a total of 106 articles emerged from the conference. These Conventions are in effect for those countries which ratified or acceded to them.

² The 1958 Convention on the High Seas provides in Article 2 for the following freedoms of the high seas: (1) freedom of navigation; (2) freedom of fishing; (3) freedom to lay submarine cables and pipelines; (4) freedom to fly over the high seas; and (5) other freedoms which are recognized by the general principles of international law. 13 UST 2312, TIAS No. 5200, 450 UNTS, 52 AJIL 842 (1958). The major maritime powers have, since 1958, considered that freedom of scientific research is one of the implied freedoms of the high seas.

³ The Second Law of the Sea Conference was held at Geneva from March 17 to April 26, 1960, for the purpose of deciding on a uniform breadth of the territorial sea and exclusive fisheries zone. Eighty-eight delegations were in attendance. No agreement was reached. The Third Law of the Sea Conference convened its first session in New York in December, 1973 for the purpose of establishing a new regime for the oceans. Over 140 delegations attended the New York session, as well as subsequent sessions in Caracas, Geneva, and again New York.

⁴ By the beginning of 1976, 29 states claimed a 3-mile territorial sea, 18 had claims between 3 and 12 miles, 56 claimed 12 miles, 11 claimed between 12 and 200 miles, and 9 claimed 200 miles. See *National Claims to Maritime Jurisdiction*, in OFFICE OF THE GEOGRAPHER, BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEPT. OF STATE, INTERNATIONAL BOUNDARY STUDY, SERIES A, LIMITS IN THE SEAS, No. 36 (Rev. ed. 1975) (hereinafter INTERNATIONAL BOUNDARY STUDY).

Archipelagic states have moved to close off as national waters all marine areas inside straight baselines connecting the outermost points to the island systems.⁵ There is also the emerging concept of an extended economic zone, stretching to a maximum of 200 nautical miles off countries' coasts. Within such a zone, fishing rights and continental shelf resources would be under coastal state control; it is uncertain what other traditional freedoms of the high seas would also be affected by the adoption on a global scale of the economic zone concept.⁶

A second element of change in ocean management procedures is the concern being expressed over differences in the needs and interests of the countries of the world with respect to the sea. The number of independent countries now exceeds 150.⁷ Most of these are developing states and among them are the 26 "least developed" states.⁸ Thirty countries (the bulk of them developing countries) are land-locked⁹ and a number of others are "geographically disadvantaged."¹⁰ In a world where even the very small states can achieve visibility through UN-related activities, the needs and interests of the developing countries, particularly as reflected in the "Group of 77,"¹¹ have become a growing component in ocean management strategies. One manifestation of this interest of "disadvantaged"

⁵ For a description of certain straight baseline regimes, see *Straight Baselines, The Philippines*, in INTERNATIONAL BOUNDARY STUDY, No. 33 (1971) and *Straight Baselines, Indonesia, id.*, No. 35 (1971).

⁶ The coastal state might have jurisdiction in the economic zone with regard to scientific research, pollution control and abatement, the establishment and use of artificial islands and installations, and the production of energy from water, currents, and winds.

⁷ As of August 2, 1976, the opening date of the second New York session of UNCLOS III, there were 157 independent countries of the world, a figure which excludes Rhodesia.

⁸ The original twenty-five "least-developed countries" were Afghanistan, Benin (Dahomey), Bhutan, Burundi, Central African Empire, Chad, Democratic Yemen, Ethiopia, Gambia, Guinea, Haiti, Laos, Lesotho, Maldives, Malawi, Mali, Nepal, Niger, Rwanda, Sikkim, Somalia, Sudan, Tanzania, Upper Volta, and Yemen. See UN Doc. E/AC.54/L.72 (1975). Sikkim was adsorbed into India in 1975. Bangladesh, Democratic Yemen, and Gambia have since been added to the list.

⁹ Afghanistan, Andorra, Austria, Bhutan, Bolivia, Botswana, Burundi, Central African Empire, Chad, Czechoslovakia, Hungary, Laos, Lesotho, Liechtenstein, Luxembourg, Malawi, Mali, Mongolia, Nepal, Niger, Paraguay, Rhodesia, Rwanda, San Marino, Swaziland, Switzerland, Uganda, Upper Volta, Vatican City, and Zambia.

¹⁰ The criteria for inclusion of states among the "geographically-disadvantaged" have never been well established. At the spring 1976 New York session of UNCLOS III, the following coastal states were members of the "Land-locked and Geographically Disadvantaged" group: Algeria, Bahrain, Belgium, Bulgaria, Ethiopia, Finland, Federal Republic of Germany, Gambia, German Democratic Republic, Greece, Iraq, Jamaica, Jordan, Kuwait, Netherlands, Poland, Qatar, Singapore, Sudan, Sweden, Turkey, United Arab Emirates, and Zaire. Byelorussia, which is land-locked, was also a member of the group. For a discussion of definitional problems see Alexander & Hodgson, *The Role of the Geographically-Disadvantaged States in the Law of the Sea*, 13 SAN DIEGO L. REV. 560 (1976).

¹¹ The so-called "Group of 77," representing the developing states of the world, now has a membership of over 100 countries. At UNCLOS III it has attempted to operate on a rule of consensus.

states is reflected in their demand to receive compensation in one form or another in any new law of the sea regime.¹²

A third factor, which interacts closely with the first two, has been the emergence of multistate regional interests and arrangements with regard to ocean affairs. Although some marine regional activities predate or immediately follow World War II, the major impetus to the growth of regional institutions is largely a phenomenon of the past decade. The dimensions of this development are still unclear. While regional solutions to the handling of ocean management problems are but one of a series of alternative strategies, ranging from unilateral approaches at one end of the spectrum to global regimes at the other extreme, they offer certain opportunities for management action which may become increasingly relevant in coming years.

Several points should be noted at the outset of this discussion. The first is that, since great diversity exists among marine regional institutions and activities, it is often difficult to draw valid generalizations about either the regional arrangements themselves or the management problems they are intended to handle. A second point is that most regional systems are still at an early stage of development, with the result that few elements may prove to be transferable from one set of experiences with regional management activities to another. Finally, there is often little consensus among policymakers as to the nature of geographic regions and subregions and as to the limitations, as well as opportunities, which may exist for regional action on ocean-related problems.

PARAMETERS OF MARINE REGIONAL ACTION

One of the basic questions relating to marine regional issues is which ocean management problems are particularly suited to regional action rather than on the unilateral or bilateral level. The whole rationale for regional systems is that they provide a more effective form of approach to problem-solving than do systems at some other organizational level. This leads in turn to a second question of the geographic framework within which marine regional arrangements are developed. There are certain clearly defined "physical" regions of the ocean environment, such as semi-enclosed seas the management problems of which would frequently seem to require regional resolutions. But there are also wide differences among the semi-enclosed seas of the world in terms of such factors as the conditions of marine resource use, relations among the littoral states, and perceptions of policymakers as to problems requiring regional action. Further, many of the marine-related issues which might respond to regional or subregional action are not found in partially enclosed water bodies but rather in the open oceans, where physical boundaries are difficult, if not impossible, to define.

¹² See Franck, Barade, & Aron, *The New Poor: Land-Locked, Shelf-Locked, and Other Geographically Disadvantaged States*, 7 N.Y.U.J. INT'L. L. & POL. 33-57 (1974). See also, Alexander & Hodgson, *supra* note 10.

Another question involves the institutional frameworks within which regional marine systems are established. To what extent are member states of a regional unit accustomed to working together on mutual problems? What interests do these countries perceive as being met through support of a particular regional operation? What divisive forces may there be among participants resulting from territorial, ideological, or other differences, which could have spillover effects on marine-related activities? What integrative forces might work to promote or hold together regional systems? Where is the leadership? What are the sources of financial support? What are the institutional mechanisms for carrying out the objectives of the system? Are the goals, as established, realistic? Are there built-in opportunities for necessary changes over time? Finally, what effects may new law of the sea developments have on the nature of existing or future regional systems?

Still another set of questions concerns the impacts of marine regional arrangements both on the marine environment and on general international power relationships. Will regional actions preserve, and possibly improve, the quality of the marine environment in such bodies of water as the Mediterranean and the Baltic Seas? Will more rational fisheries management practices develop in a given area as a result of regional fisheries activities there? From the arrangements themselves, will regional leader-states emerge as key actors in future law of the sea activities?

The approach to these questions adopted here is to consider first the nature of marine regions and arrangements; second, the scope of existing regional systems; and finally, trends in regionalism and their potential impacts on the national and international scene. In this way some perspective may be gained on the opportunities and limitations of a regional approach.

The questions noted above are obviously interrelated. One of the effects of recent law of the sea activities will probably be the worldwide imposition of a 200-mile economic zone. While the details of the exercise of national competences within the zone are not fully defined, it is clear that coastal states will at a minimum enjoy preferential or exclusive fishing rights therein. This fact, along with increased competition among countries in the harvesting of available stocks, should make certain resource rich areas, such as the Arabian Sea or the Patagonian Shelf, particularly critical for future international fishing efforts. Any regional fisheries organizations in these areas will be of great concern to distant-water fishing states, such as the Soviet Union, the Federal Republic of Germany, and Japan, a condition which may also come to apply to the Antarctic waters with their enormous krill population. Clearly one of the key aspects of marine regionalization is accessibility, that is, the opportunity for states to participate in desired marine-related activities in certain areas. If the trend toward regional institutions means that some nonregional countries may, and others may not, be allowed to utilize waters in certain regions for fishing, research, or other purposes, the results could have considerable international consequences.

THE NATURE OF REGIONS AS MARINE-RELATED PHENOMENA

The term "region," as used in its geographic context, refers to an area of the earth's surface which is set apart from other areas by the existence of one or more distinctive characteristics. The identifying element may be physical in nature, as in the case of desert or mountainous regions; conversely, some political, economic, or other nonphysical factor may distinguish the region as a separate geographic entity. While the parts of a geographic region are generally contiguous to one another, the unit often contains one or more subregions. The distinguishing feature may also consist of a common interest or problem.

With respect to ocean affairs, "region" or "regional" can have either of two basic connotations. One relates to an expanse of water that is set aside from other parts of the world ocean by some distinctive feature or features, such as the configuration of surrounding land areas. The Arctic Ocean and the Black and Mediterranean Seas are examples of physically defined "marine regions"; each contains subregions, *e.g.*, the Adriatic Sea which is a subregion of the Mediterranean.

A second connotation is that a group of countries in an area has similar interests in ocean matters. References are often made to "regional blocs," such as the Latin American or African states, the members of which adopt common policies toward ocean issues.¹³ Used in this sense, the regions are functional "marine-oriented" units, which reflect the common concerns their members have with ocean issues. One of the first such "marine-oriented" regions, following World War II, comprised Chile, Ecuador, and Peru, which banded together in asserting 200-mile offshore claims in the Pacific.

The two connotations may overlap with one another. The Baltic Sea, for example, is a physically defined "marine region" with its own unique problems of fisheries management, pollution control, and other maritime activities. The states surrounding it, in turn, represent a "marine-oriented" region because of their common concern for the sea's protection and development. Regional management issues for the Baltic can therefore be perceived either from the standpoint of the marine environment itself and of the marine problems requiring regional action or from the perspective of the littoral states of the Baltic region and of their willingness to work together on management issues relating to the Baltic. This dichotomy of approaches is one of the potentially confusing aspects of the regional concept.

There also may be circumstances in which the common interests of states of a "marine-oriented" region are focused not on one clearly defined water area but rather on some particular process, ocean policy objective,

¹³ As an illustration, a policy declaration adopted by the Organization of African Unity at Addis Ababa in July 1973 supports the right of land-locked and other disadvantaged countries to share in the exploitation of living resources of the economic zones of neighboring states on an equal basis as nationals of the coastal states. See Danzig, *A Funny Thing Happened to the Common Heritage on the Way to the Sea*, 12 SAN DIEGO L. REV. 659 (1975).

or other phenomenon. A group of countries in one geographic area may be concerned, for example, with routes of access to the sea for a land-locked country, such as Zambia, or with the development of a "regional" port, such as Lourenço Marques, which handles the seaborne trade of several southern African states. Neighboring countries may also band together in support of some ocean policy action, such as developing a "matrimonial sea" concept,¹⁴ or opposing the creation of special international organizations with regulatory authority over highly migratory species, even when these are within the extended fisheries zones of coastal states. The use of the term "region" with respect to states' actions or interest is often ambiguous and may at times be found to lack any empirical support for the classification. The term, nevertheless, is increasingly employed in connection with law of the sea matters.¹⁵

MARINE REGIONS

For purposes of identification, three main types of marine regions will be noted here: (1) physical regions; (2) management regions; and (3) operational regions.

Physical Regions. Amid the complex of regional forms and functions some order may be found through the framework of the physical marine regions of the world. These are finite in number and may be divided into two subgroups—ocean basins and semi-enclosed seas.

Of the ocean basins, there may be said to be nine: the North and South Atlantic,¹⁶ the Indian, Arctic, and Antarctic,¹⁷ and four units of the Pacific—North, South, West Central, and East Central.¹⁸ Each of the oceanic "regions," with the exception of the Central and South Pacific units, has a certain distinctiveness by reason of the configuration of surrounding land areas. The Atlantic and Pacific basins are often subdivided for manage-

¹⁴ The "matrimonial sea" proposal first surfaced at the Conference of Latin American States held at Santo Domingo in June 1972. Its thesis was that littoral states of a maritime area should have the right to participate on an equitable basis in fishing in the waters of the area seaward of coastal states' twelve-mile limits. Nationals of nonlittoral states would be excluded. The concept was not included in the final Declaration of Santo Domingo, June 7, 1972. See I LAY, CHURCHILL, & NORDQUIST, *NEW DIRECTIONS IN THE LAW OF THE SEA* 247 (1973).

¹⁵ States having common concerns, particularly with respect to ocean policy issues, may, of course, be considerably removed geographically from one another, as in the case of land-locked or archipelagic states. Seen in this context they do not represent a "region" but rather an "interest group."

¹⁶ A workable dividing line between the North and South Atlantic basins might extend from Cape Sao Roque, Brazil (5° S.Lat.) to Cape Palmas, Liberia (5° N.Lat.).

¹⁷ There is no officially designated "Antarctic Ocean." But because of the existence of the Antarctic Treaty, all waters south of 60° S.Lat. should be included within an oceanic body separate from the South Atlantic, South Pacific, and Indian oceans.

¹⁸ In terms of a variety of factors, both physical and nonphysical, the North Pacific might be considered as constituting the maritime area north of the Tropic of Cancer (23½° N.Lat.) and the South Pacific, that area south of the Tropic of Capricorn (23½° S.Lat.). The Central Pacific, lying between the two Tropics, could be subdivided into West and East by the International Date Line (approximately 180° Long.).

ment purposes into subregions, such as the Northwest and Northeast Atlantic and the Southeast Pacific.

The designation of ocean basins as regions and subregions represents more than an academic exercise. Diplomats, naval officers, fisheries experts, shippers, and others often think in these terms. There are such obvious cases as the North Atlantic Treaty Organization, the North Pacific Fur Seal Commission, and the designation of the Indian Ocean as a "Zone of Peace."¹⁹ There is a fishery committee for the Eastern Central Atlantic and a commission for the Western Central Atlantic, as well as commissions for the Northeast and Northwest Atlantic fisheries. To go one step further, there is, under the Intergovernmental Oceanographic Commission (IOC), a program for Co-operative Investigations of the Northern Part of the Eastern Central Atlantic. Clearly the concept of oceanic regions and subregions is an accepted one, although differences may exist as to the number of principal subregions and the geographic limits separating them from one another.

Table I

SEMI-ENCLOSED SEAS

Gulf of Aden	Sea of Japan
Arabian Sea	Mediterranean Sea
Andaman Sea	Gulf of Mexico
Baffin Bay-Davis Strait	North Sea
Baltic Sea	Sea of Okhotsk
Bay of Bengal	Gulf of Oman
Bering Sea	Persian (Arabian) Gulf
Black Sea	Red Sea
Caribbean Sea	Solomon Sea
Celebes Sea	South China Sea
East China-Yellow Sea	Sulu Sea
Gulf of Guinea	Timor-Arafura Seas

Semi-enclosed seas, that is, seas that are partially surrounded by land areas, belong to a second category of physical regions. In a recent study of the semi-enclosed seas of the world,²⁰ several arbitrary criteria were suggested for differentiating "semi-enclosed" from other marginal water bodies. It was suggested that a semi-enclosed sea should have an area of at least 50,000 square nautical miles, be a primary sea rather than an arm of a larger semi-enclosed water body, and have at least 50 percent of its circumference occupied by land. Subsequent research on the topic in terms of the regional arrangement criteria has indicated that the statistical requirements should be seen as guides, rather than as inflexible limits,

¹⁹ See Resolution of December 16, 1971, declaring the Indian Ocean as a Zone of Peace, G.A. Res. 2832, 26 GAOR, Supp. (No. 29), at 36, UN Doc. A/8429 (1971), 9 ILM 217 (1972). The resolution contained no definition of the geographic limits of the Indian Ocean.

²⁰ See Alexander, *Regionalism and the Law of the Sea: the Case of Semi-Enclosed Seas*, 2 OCEAN DEV. & INT'L. L.J. 151 (1974).

with the added condition that the sea is bordered by two or more states.²¹ Using the several criteria noted above, the 24 seas listed in Table I would qualify as semi-enclosed seas.

The rationale for the list in Table I is that it indicates physically defined marine regions which are considered sufficiently extensive and distinguishable from other ocean areas to be suitable as sites for one or a series of regional management activities. But it must be acknowledged that physical marine regions, per se, are in no way determinative of regional action. Their importance to regional arrangement issues may be measured in terms of three criteria.

First, because of the physical uniqueness of most physical marine regions, they represent logical sites for management programs. This is particularly true for water bodies such as the Red and Mediterranean Seas, where there is little exchange of water with the open ocean and where there is, in effect, a relatively closed marine ecosystem. A second function of physical marine regions is that policymakers tend to think in terms of comprehensive geographic units and therefore often plan regional arrangements on a unit-wide basis. The countries of the Caribbean, for example, seem to spend little time considering programs for the western or eastern Caribbean but rather think in terms of the region as a whole. Finally, physical marine regions can serve a role in comparative studies of regional activities. Since programs and statistics tend to be oriented within the framework of traditional geographic regions, it becomes possible, for example, to compare the success or failure of Baltic or North Sea projects for fisheries or pollution control with those of other areas such as the Red or South China Seas.

Beyond the semi-enclosed seas are all manner of subregions, such as the Sea of Azov, the Gulfs of Bothnia, Thailand, and Aqaba, and the northwestern approaches to the Strait of Malacca. These could be the sites of less extensive regional institutions. One of the more unique sub-regional systems is that of archipelagos. The two largest—those formed by Indonesia and the Philippines—have within their borders a number of partially enclosed seas, such as Java, Flores, Banda, and Molucca. The two archipelagic states also share in the control of the Celebes and Sulu Seas. The issue of archipelagic waters has been a difficult one at the Third Law of the Sea Conference. In Part II of the Revised Single Negotiating Text which emerged from the spring 1976 New York session of the Conference, Articles 118 through 127 suggest approaches to questions of the status of such waters and the rights of passage by foreign vessels through them.²² Associated with archipelagos are island arcs, such

²¹ Hudson Bay and the Bismarck and Kara Seas would qualify as semi-enclosed seas from a regional standpoint, if there were no requirement that they be bordered by two or more states. So would the Java/Flores/Banda Sea complex in Indonesia. Such seas would not appear susceptible to any form of multistate management schemes.

²² See Revised Single Negotiating Text, UN Doc. A/CONF.62/WP.8 Rev.1, May 6, 1976.

as the Leeward and Windward Islands of the Caribbean. Here, as in the case of archipelagos, the nature of regional arrangements depends strongly on the political configurations of the component units.²³

Management Regions. This second type of marine region is functional in nature and responds to a situation where there is a well-defined management problem that is capable of being handled as a discrete issue. The problem may be in the area of fisheries, environmental control, scientific investigation, or some other ocean activities. The annual range of migratory species, such as the yellow fin tuna,²⁴ or, on a more limited basis, the Arctic cod, might form the basis for a management region. On a more restricted level would be the New York Bight, a favorite ocean dumping site, and one which poses potentially serious environmental problems. The important point is that the area in which the problem occurs may be distinguishable geographically from other maritime areas, thereby justifying its treatment as a separate marine region. The problem itself may have subcomponents, and thus the region would likewise be divisible into subregions.

Management regions exist because of an identifiable problem or group of problems that justify some form of administrative action. The regions may or may not conform to physical marine regions or subregions. And the regions themselves may differ for different activities; a fisheries management unit in one part of the world ocean, for example, may not be the same as an environmental control area in this same sector. It should also be noted that management regions may not always come under the purview of multistate bodies. The Gulf of California, for example, is a semi-enclosed water body that might serve as a model management region, but it is wholly surrounded by Mexico. Yet regardless of which organizations can or should perform the administrative functions, the concept of management regions and subregions, as rational units for action, remains a valid one.

It would be difficult to compile a world map of potential management regions according to the various categories of marine-related activities, although such a map would certainly be an asset to the ocean management process. The task of identifying discrete management areas is largely an inductive one that requires considerable time and expertise with respect to each of the activity areas concerned. One of the associated problems, as for example, with respect to fisheries, concerns the statistical areas that are set up in the interests of management. If the areas themselves do not correspond to discrete fisheries units, the statistical data may

²³ The interspersal of French and British owned islands in the Lesser Antilles has been a major stumbling block to regional cooperation there. Divided jurisdictions also exist in the Solomon Island chain.

²⁴ For a description of the coordinates of the maritime limits of the Inter-American Tropical Tuna Commission (IATTC), which is concerned with the management of the yellow fin tuna, see Carroz, *Establishment, Structure, Functions and Activities of International Fisheries Bodies, II Inter-American Tropical Tuna Commission (IATTC)*, FAO FISHERIES TECHNICAL PAPER No. 58, at 2 (1965).

prove misleading and any management region set up on the basis of the figures may not be a viable one.

Operational Regions. These marine regions are the sites of one or more formal regional arrangements. They may be defined, for example, by the limits of competence of a regional fisheries commission or council, by the areal extent of the ocean space within which investigations by a scientific working group are being carried out, or by the terms of an international treaty, such as that for the Antarctic. Once a marine regional arrangement goes into effect, the maritime area to which it applies becomes an "operational" region.

The relationship between a "management" and an "operational" region is this: A management region exists because of the presence of an identifiable problem which is capable of being handled within the limits of that region. The framers of a regional treaty or other type of arrangement would be expected to recognize the existence of the management problem within its proper areal bounds and would fashion the arrangement accordingly. In this case the management region also becomes operational. But unfortunately in many instances the operational area established by decisionmakers either represents a case of attacking the wrong management issue or else is a case of addressing the right issue but within the wrong geographic limits.

"Physical" marine regions are "operational" as well when they are the scenes of marine regional arrangements. Some semi-enclosed seas, such as the Caribbean, constitute more than one operational region, since they are the sites of arrangements on regional fisheries, scientific research, pollution control, or other activities.

Two points in particular are important about operational regions. In the face of their pattern of coverage, worldwide, including areas of overlap, particularly with respect to differing activity areas, what effects would the universal adoption of 200-mile economic zones have on these operational units? Second, what nonlittoral states are participants in the operational systems? Patterns of distant-water interests form an important component of international relationships among states.

MARINE-ORIENTED REGIONS

If one approaches regional action in the oceans from the perspective of participating states, rather than of the environmental problems requiring action, several factors become evident. The concerns of a country in a particular ocean-related issue may represent only an infinitesimal part of its overall national interest. For example, an African state might line up with other states of the continent in a show of solidarity on certain policy issues without being really concerned with the merits of the problem. Moreover, regional groupings of states on one marine-related issue may differ from those on some other marine issue. Countries of the Caribbean may join with their South American neighbors in supporting

national control over resources of the continental margin beyond the 200-mile limit, but differ with most of them in the concept of regional fishing rights in the "matrimonial sea" beyond coastal states' 12-mile exclusive fisheries zones.

Groups of countries may be accustomed to working together on non-marine issues, developing what is often referred to as a "high level of transactions."²⁵ Integration that is developed through such media as trade, mail, and telephone calls may lead to the establishing of institutions and practices that bind the countries of a region ever closer together. What evolves are "compatibility of major values" and "mutual responsiveness" among regional members. Such has been the case in the European Economic Community (EEC), the East European "Socialist" bloc, and the East African Community. Decisionmakers in such "integrative" regions acquire a sense of "regional consciousness," a belief that the benefits of joint action on certain matters outweigh the costs associated with regional cooperation. The factor of integration within such multistate groups can become an important element in marine regional systems, particularly when the time comes for significant "investments" of capital, jurisdictional sharing, or restrictive legislation by one or more of the member states.

Marine-oriented regions may also play a role in providing access to the sea and its resources for land-locked and geographically disadvantaged states. Switzerland, together with its northern neighbors, is part of a regional system, organized in the interests of access rights; so too are the states of the Danube Basin. Other land-locked countries of the world are seeking transit rights through contiguous coastal states. Some form of regional system may be established so that access to the sea may be possible through any one of a series of alternative routes through different countries.²⁶

A more contentious form of regionalism is that associated with the possible granting to land-locked and geographically disadvantaged states rights of access to the living resources of neighboring coastal states' economic zones on an equitable basis. If the immediate neighbors have few available fisheries resources in their zones, can the stocks in the economic zones of other coastal states of the "region" be made available to the disadvantaged countries? Here the regional concept itself becomes clouded. How extensive a regional unit is involved in such concessionary arrangements? Is Mauritania, with its extensive fisheries resources, part of the same "region" as land-locked Niger and Chad? Does Iraq's "region" extend beyond the limits of the Persian (Arabian) Gulf? ²⁷ In cases such

²⁵ See, for example, NYE, *PEACE IN PARTS: INTEGRATION AND CONFLICT IN REGIONAL ORGANIZATION* 32 (1971).

²⁶ Zambia is connected by rail with both the east (via Tanzania, Zaire, and Angola) and west (via Rhodesia and Mozambique) coasts of Africa and with the South African rail network. Chad, in contrast, has no direct rail links with the sea.

²⁷ A possible definition of "regions," as seen on a global basis, could correspond with the Regional Economic Commissions of the UN Economic and Social Council. The four Commissions are: (1) Economic Commission for Europe (ECE); (2) Eco-

as these it becomes apparent that all regions are in a sense intellectual concepts—techniques for organizing phenomena into manageable patterns.

MARINE REGIONAL ARRANGEMENTS

An alternative to the assessment of marine regionalism from the standpoint of the regions themselves or of the interactions of their member states is the analysis of regional arrangements, whether these be in the form of treaties, conventions, or other types of agreements, or of the institutional mechanisms resulting from these multistate actions. Here, as in the discussion on regions, a primary set of questions involves the type of problems to be resolved by the arrangements. Can they best be solved at the regional level, rather than by some other approach? Do the anticipated benefits of regional action justify the costs?

Once the case for a regional management approach has been established, great diversity exists as to the forms and functions of arrangements. Some regional units exist as councils or commissions with certain regulatory powers; others are multistate working groups. A number are affiliated with the United Nations or one or more of its specialized agencies. A systematic review of marine regional institutions would include such elements as membership, geographic coverage of the unit, objectives, organizational structure, regulatory powers, and conditions of operation. Membership, for example, can be restricted or open, and the member states may be at the same or differing levels of economic development. The interests and perceptions of goals on the part of the member states may also vary considerably. In addition to these issues, some attempt might also be made to assess a regional system's viability in terms of the achievement of its goals.

Rather than to attempt a comprehensive survey of all aspects of marine regional arrangements, only a few selected components will be assessed here. These are seen as having the greatest universality in terms of their relevance to the operations of regional systems. The components include (1) activity area, (2) institutional level, (3) use category, (4) objectives, and (5) integrative forces.

(1) *Activity Area.* A regional system may focus on fisheries management, scientific research, pollution control, military use, commercial shipping, or access to the sea. The term "scientific research" is used here to include all forms of data acquisition. In time, regional institutions may be evolved for energy production, seabed mining, dispute settlement, or other categories. As noted earlier, regional agreements also exist among states to permit the establishment of common policy positions toward ocean issues.

Differences in activity area generally dictate considerable differences in the form and functions of corresponding regional arrangements. Cer-

omic and Social Commission for Asia and the Pacific (ESCAP); (3) Economic Commission for Latin America (ECLA); and (4) Economic Commission for Africa (ECA). The United States is a member of all the Commissions except ECA.

tain elements of success or failure among regional fisheries councils or commissions, for example, may prove to have little relevance with respect to the viability of regional pollution control arrangements. Yet here, as in the case of other components of regional systems, commonalities exist, particularly with respect to the alternative methods available for carrying out regional activities.

(2) *Institutional Level.* There are three basic levels of regional marine systems. First, there is collective action by states, that is, arrangements which do not impose "any greater 'costs' on states than does the situation to which they are to respond."²⁸ Future interests are "discounted in favor of more immediate ones, and the viability of the collectivity of states is simply an instrument for the viability of individual states."²⁹ Many of the joint scientific efforts carried out under the International Decade of Ocean Exploration (IDOE) would fall within this category.³⁰ So too would the joint fisheries surveys performed under the auspices of the Food and Agriculture Organization of the United Nations (FAO).

At the second level are regional regimes "consisting of sets of mutual expectations, generally agreed to rules, regulations, and plans, in accordance with which organizational energies and financial commitments are allocated."³¹ The degree of regulatory action varies considerably among regimes. On the one hand is the International Convention for the Regulation of Whaling, the catch limitations of which must be accepted by all the member states of the International Whaling Commission. At the other extreme would be the "Caribbean Community for Ocean Development," as proposed by a nongovernmental group several years ago, which, among other functions, could, if necessary, have jurisdiction over production and/or pricing of living and nonliving resources of the area, as well as over other activities.³²

At the third institutional level are regional organizations such as the International Commission for the North-West Atlantic Fisheries (ICNAF), which are involved in planning, decisionmaking, and implementation of programs. It is toward the organizations themselves, their structure and functioning, that much of the concern of political scientists and international lawyers is directed. In many ways regional organizations themselves have an impact on ocean policy issues. But so too do the regimes and collective activities that these organizations generate.

(3) *Use Category.* Regional arrangements may be made in the interests of *shared use* within a specific area, *complementary use*, *compensatory use*, *limited use*, and *administrative use*. Sometime in the future, *comprehen-*

²⁸ Ruggie, *International Responses to Technology: Concepts and Trends*, 29 INT'L ORGANIZATION 570 (1975).

²⁹ *Ibid.*

³⁰ See Intergovernmental Oceanographic Commission, *The International Decade of Ocean Exploration (IDOE)*, 1971-1980, in TECHNICAL SERIES No. 13 (1974).

³¹ *Supra* note 28, at 569.

³² See Krieger, *A Caribbean Community for Ocean Development*, CARIBBEAN STUDY PROJECT WORKING PAPERS: PACEM IN MARIBUS IV, at 441 (1973).

sive use provisions may be adopted. The type of use is important, both because of the degree of investment by member states which may be involved and because of the element of accessibility to the area covered by the arrangement.

Shared use means that two or more countries can utilize the same marine areas on a generally equitable footing. A good example of this are the mutual fishing rights of the EEC member states in each others' waters.³³ At the Third Law of the Sea Conference there were references to the "matrimonial sea" concept, namely that the waters of semi-enclosed seas, beyond a twelve-mile territorial limit, should be designated as a common fishery ground for littoral states.³⁴ Scientific research in the Antarctic is carried out on a "shared use" basis. The point is that multistate activities are performed simultaneously and by agreement within an area with few or no concessions necessary for the common good on the part of the participants themselves.

Complimentary use, on the other hand, involves some form of investment on the part of the regional participants. In the case of international fisheries commissions and councils the investment may take the form of cooperative action in data acquisition, conservation measures, oceanographic research, and the allocation of the living resources of the region among member states. With respect to scientific research, IOC has instituted a wide variety of multilateral scientific programs and "Co-operative Investigations"³⁵ in many parts of the world. IOC has also launched a technology transfer program, TEMA (Training, Education and Mutual Assistance), which has held a number of regional meetings designed to promote cooperative actions among developing countries.³⁶

Compensatory use is an arrangement which might emerge from the Third Law of the Sea negotiations, either as a part of a final treaty or as a gradually accepted mode of international behavior. As noted earlier, it has been suggested that land-locked countries may not only be entitled to the right of access to the sea through neighboring transit states, the joint use of port facilities of such states, and joint management of transportation media linking the land-locked states with the sea, but also to the right to exploit on an equitable basis the living resources of an adjoining coastal state's economic zone.³⁷ Certain other compensatory arrangements may also come to apply to coastal "disadvantaged" states.³⁸

Limited use arrangements are potentially the most dangerous so far as the major maritime powers are concerned. The Soviet doctrine of "closed"

³³ See Hardy, *Regional Approaches to Law of the Sea Problems: The European Economic Community*, 24 INT'L & COMP L.Q. 336 (1975); Janis, *The Development of European Regional Law of the Sea*, 1 OCEAN DEVELOPMENT & INT'L L. 275 (1973).

³⁴ UN Doc. A/CONF.62/SR.27, July 3, 1974. See also *supra* note 14.

³⁵ *Supra* note 30.

³⁶ See INTERGOVERNMENTAL OCEANOGRAPHIC COMMISSION, SUMMARY REPORTS, REGIONAL AD HOC TEMA MEETINGS (Mexico City, 10-12 April 1975; Casablanca, 3-5 June 1975; Manila, 15-19 September 1975; Cairo, 4-8 January 1976).

³⁷ *Supra* note 22, Part II, Article 58.

³⁸ See Alexander & Hodgson, *supra* note 10.

or "regional" seas would deny the right of nonlittoral military vessels to enter the Black, Baltic, and Okhotsk seas, and the Sea of Japan.³⁹ The possible establishment of certain water bodies as "zones of peace" could further restrict movement. And if more and more coastal states extend their economic zones to 200 miles from shore, and if power contests between developed and developing states should increase in future years, the potential exists for excluding warships, research vessels, and fishing vessels of some or all major maritime powers from key areas, particularly semi-enclosed seas the waters of which are completely shut off by 200-mile claims.⁴⁰

The principal *administrative use* region at this time is the Antarctic. According to the Antarctic Treaty, which was signed by twelve states in 1959⁴¹ and entered into force in 1961, the Antarctic area south of 60° South Lat. is to be used for peaceful purposes only, with all national territorial claims and rights "frozen" for the ensuing thirty years. The international scientific cooperation which characterized the International Geophysical Year (IGY) of 1957-58 is to be continued, and an unprecedented system of unilateral inspection of any part of Antarctica by observers of any signatory state is provided for. Although there is no single administrative body for Antarctica, the signatory states convene from time to time to discuss its administration.

There are no true *comprehensive use* marine regions yet, except in areas under the jurisdiction of one state, such as Hudson Bay. Obviously the greater the number of littoral countries, the greater the difficulty of agreeing either on an overall regime for the administration of a single water body or on the coordination of specific regional use arrangements, as for fisheries and pollution control. But it is not inconceivable that in coming years coastal states may designate certain partially enclosed bodies of water, such as the Persian Gulf, as, in a sense, their "common property" to be comprehensively managed by the littoral states in concert with one another.⁴²

(4) *Objectives*. From use categories we move to objectives. Skolnikoff⁴³ notes four "functions" of international organizations: service, norm creation and allocation, rule observance and settlement of disputes, and

³⁹ See W. BUTLER, *THE SOVIET UNION AND THE LAW OF THE SEA* 127 (1971).

⁴⁰ Of the semi-enclosed seas noted in Table I, only the Arabian Sea, Bay of Bengal, and the Gulf of Guinea would contain extensive areas beyond the 200-mile economic zone. The other regions would be totally or almost completely closed off by 200 mile zones.

⁴¹ 12 UST 794, TIAS No. 4780, 402 UNTS 71; 54 AJIL 477 (1960). The original parties were Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, USSR, United Kingdom, and United States. Later accessions include Czechoslovakia, Denmark, German Democratic Republic, Netherlands, Poland, and Romania.

⁴² Such a regime, according to at least some of the littoral states, already exists in the Gulf of Fonseca on the Pacific coast of Central America.

⁴³ SKOLNIKOFF, *THE INTERNATIONAL IMPERATIVES OF TECHNOLOGY: TECHNOLOGICAL DEVELOPMENT FOR THE INTERNATIONAL SYSTEM* 13-16, 102-110 (1972).

operations. Among "services" he includes information exchange, data gathering and analysis, consultation, facilitation and coordination of programs, and joint planning. Most existing regional marine systems perform the function of providing such "services." A few are concerned with "norm creation and allocation," through the establishment of standards and regulations and the allocation of costs and benefits. Within this category are ICNAF and the North-East Atlantic Fisheries Commission (NEAFC).

"Rule observance" includes monitoring and enforcement of standards. The only regional fisheries organization that would fall within this group is the International Pacific Salmon Fisheries Commission, involving the United States and Canada. The Commission has achieved considerable success over the years, but it is "almost exclusively concerned with the regulation of fisheries in internal and territorial waters . . . [and] it has the unique power to make certain decisions that are directly binding on the fishermen."⁴⁴

"Operations" organizations, as defined by Skolnikoff, are concerned with resource exploration and exploitation, technical assistance, research analysis and development, and provision of financial support. Probably the only regional "operations" institution with respect to the oceans is the International Council for the Exploration of the Sea (ICES), founded in 1902 in Copenhagen to encourage research connected with the exploration of the sea and to coordinate the activities of participating members.⁴⁵ The proposed International Seabed Authority would be an operational organization, with regional components.⁴⁶

The issue of objectives is often associated with both the support base of a regional institution and its regulatory powers. Among fisheries organizations, for example, such groups as ICNAF, NEAFC, and IPHC (the International Pacific Halibut Commission) receive their funding directly from member states and have at least some regulatory functions. On the other hand, none of the FAO-sponsored fisheries organizations (which involve mostly developing states) has regulatory powers. Their functions are largely confined to data acquisition and analysis and to coordination of national fisheries programs. The United Nations Educational, Scientific and Cultural Organization (UNESCO) is another source of regionally sponsored activities, particularly through IOC, although the latter often tends to act more in a coordinating role rather than as a funding or administrative body.

(5) *Integrative Forces.* A final characteristic to be considered is the integrative and disintegrative forces existing within each regional system. Among the integrative forces are (1) the existence of other international

⁴⁴ KOERS, INTERNATIONAL REGULATION OF MARINE FISHERIES 84 (1973).

⁴⁵ Members of ICES are Belgium, Canada, Denmark, Federal Republic of Germany, Finland, France, Iceland, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Spain, USSR, and United Kingdom.

⁴⁶ *Supra* note 22, Part I. Article 20(4) notes that the Authority "may establish such regional centres or offices as it deems necessary for the performance of its functions."

arrangements among member states which would tend to reinforce the regional consciousness of the participants; (2) the perception by members of the existence or promise of a favorable cost/benefit ratio so far as participation in the arrangement is concerned; and (3) a strong leadership role by some state, states, or international organization, possibly including financial and technical aid for the effort. Both the investments by all or some of the member states and the benefits derived from regional action may at the current time be small, but in the long run, there may be a considerable "payoff" from regional cooperation.

Disintegrative forces would include (1) political, territorial, ideological, or other differences among member states; (2) unfavorable cost/benefit ratios, including unequal costs and/or benefits to particular members, as perceived by their or other governments; (3) nonmembership of one or more states of the region, and (4) nonparticipation *de facto* in the activities of the arrangement by one or more member states.

THE SCOPE OF EXISTING MARINE REGIONAL INSTITUTIONS

There are scores of regional agreements, conventions, and organizations related in one way or another to the oceans. The list of arrangements presented here is by no means exhaustive but is intended to emphasize the variations in the nature and functions of such units. The institutions discussed are arranged according to activity area.

In international fisheries management, there are about two dozen commissions and councils. Most of these are concerned primarily with data acquisition and analysis. Six of the units have been established and maintained by the FAO Department of Fisheries (see Table II). The others are independent bodies, although they cooperate closely with FAO. New regional organizations are established from time to time, the two most recent being the Baltic Sea and Western Central Atlantic Fishery Commissions (1974). Most regional organizations have open membership, and states with important distant-water fleets tend to participate in regional units for areas in which their fleets operate.⁴⁷

Various activities are associated with international fisheries management. First, there is need for data on (1) biological factors, such as rates of recruitment, growth and mortality, migratory ranges of species, and fluctuations in year classes; (2) technological conditions, including fishing methods and gear, and rates of catch; and (3) economic and social factors, such as demand for fish and fish products, structure of the fishing industry, wage and price levels, and conditions of technology transfer. Such data for any regional unit must be assembled, correlated, and analyzed in order to form a scientific basis for management. As noted earlier, most of the regional fisheries groups are primarily concerned with these

⁴⁷ Japan, for example, is a member of CECAF, ICCAT, ICNAF, ICSEAF, and IOFC. Cuba belongs to IOFC, Bulgaria to ICSEAF, and the Republic of Korea to ICCAT. The North Pacific systems, on the other hand, tend to have closed membership.

Table II

REGIONAL FISHERIES ORGANIZATIONS

FAO-SPONSORED

CARPAS	Regional Fisheries Advisory Commission for the Southwest Atlantic
CECAF	Fishery Commission for the Eastern Central Atlantic
GFCM	General Fisheries Council for the Mediterranean
IOFC	Indian Ocean Fisheries Commission
IPFC	Indo-Pacific Fisheries Council
WECAFC	Western Central Atlantic Fishery Commission

INDEPENDENT

BSSSC	Baltic Sea Salmon Standing Committee
IATTC	Inter-American Tropical Tuna Commission
IBSFC	International Baltic Sea Fishery Commission
ICCAT	International Commission for the Conservation of Atlantic Tuna
ICNAF	International Commission for the North-West Atlantic Fisheries
ICSEAF	International Commission for the South-East Atlantic Fisheries
INPFC	International North Pacific Fisheries Commission
IPHC	International Pacific Halibut Commission
IPSFC	International Pacific Salmon Fisheries Commission
IWC	International Whaling Commission
JKFC	Japan-Republic of Korea Joint Fisheries Commission
JSFC	Japanese-Soviet Fisheries Commission for the North-West Pacific
MC	Mixed Commission of 1962 (Baltic Sea)
MCBSF	Mixed Commission for Black Sea Fisheries
NEAFC	North-East Atlantic Fisheries Commission
NPFSC	North Pacific Fur Seal Commission
PCSP	Permanent Commission of the Conference on the Use and Conservation of the Marine Resources of the South Pacific
SCNEA	Sealing Commission for the North-East Atlantic
SCSK	Shellfish Commission for the Skagerak-Kattegat

tasks, particularly the first two. Many organizations are also concerned with expanding and improving the fisheries activities of developing countries.

The gradual advent of the 200-mile fisheries zone raises important questions concerning the future activities of regional fisheries units. Virtually all of the water areas of the semi-enclosed seas will be closed off within national limits, as will most of the important fisheries grounds of the ocean basins. Data gathering activities may be largely unaffected by the new jurisdictions, but the slowly expanding regulatory powers of the commissions and councils may very well be curtailed. There seems to be little indication in current law of the sea negotiations that coastal states are likely to consider any diminution of their newly acquired rights in the economic zone. There are suggestions that FAO-sponsored commissions should assume managerial responsibilities and that some of the non-FAO organizations should increase their areas of competence. New coastal jurisdictions could lead to better local fisheries management practices, but they could also tend to weaken any regulatory functions regional commissions might seek to assume. Seen in this light, two trends are possible.

One is that fisheries organizations will continue to be concerned with regional development projects⁴⁸ and will become increasingly involved in data acquisition and scientific analysis, coupled with recommendations to member states for appropriate conservation efforts. The other trend is that regulatory functions will come to be largely confined to organizations dealing with highly migratory species, such as whales and tunas.

In addition to the commissions and councils themselves, there is a wide variety of sponsored fisheries programs. IOFC, for example, operates an extensive Indian Ocean Fishery Survey and Development Programme, which is largely funded by the UN Development Programme (UNDP). CEEF has a Project for the Development of Fisheries in the Eastern Central Atlantic which is also funded by UNDP. IPFC has a South China Sea Fisheries Development and Coordinating Programme. These projects of the various regional units are among the most important activities of the fisheries organizations.

Some fisheries units get into the management process itself. They may, for example, recommend size limits for certain species of fish, minimum mesh sizes, and arrangements for closed areas and closed seasons. ICNAF has gone one step further and assumed the responsibility for recommending national catch quotas within its area of concern. Catch quotas are also set by the International Whaling Commission and the North Pacific Commission. But in general regional fisheries organizations have not reached the point of imposing binding decisions upon their member states. One exception is the Pacific Salmon Fisheries Commission which, as noted earlier, can make certain decisions which are directly binding on the fishermen;⁴⁹ another is the Common Fisheries Policy of the European Community which "has largely replaced national territorial fishing waters with regional territorial fishing waters."⁵⁰

A second activity area for regional institutions concerns scientific research. Here the principal agency is IOC which is primarily a coordinating body. Most of the projects listed under its aegis are cosponsored with other agencies and institutions and are funded largely from sources outside IOC. Of more than 35 multistate scientific activities under IOC, mention should be made of its Co-operative Investigations and, secondly, of several of its more comprehensive efforts.

The Co-operative Investigations are described as "co-operative exercises in various regions of the world ocean where the exploitation of marine resources was of great importance for the bordering countries and where environmental information was deficient."⁵¹ Probably the most successful of these has been CICAR,⁵² a regional program for the Caribbean, which

⁴⁸ Notably PCSP which, since its inception, has been designed to coordinate activities in the 200-mile fishing zones of Chile, Ecuador, and Peru.

⁴⁹ *Supra* note 44.

⁵⁰ Janis, *The Roles of Regional Law of the Sea*, 12 SAN DIEGO L. REV. 560 (1975).

⁵¹ *Supra* note 30 at 46.

⁵² Co-operative Investigations of the Caribbean and Adjacent Regions. Participating countries included Brazil, Colombia, Cuba, France, Federal Republic of Germany,

has recently been terminated, to be replaced by the more ambitious IOC Association for the Caribbean and Adjacent Regions (IOCARIBE). Another program, CIM,⁵³ is a comprehensive environmental study in the Mediterranean and again has been quite successful. Other Co-operative Investigations are for the Southern Oceans,⁵⁴ the Northern Part of the Eastern Central Atlantic,⁵⁵ and the Kuroshio current system and adjacent regions, including the South China Sea.⁵⁶ In these investigations, there tends to be one or more "lead" states, with the others acting in a co-operative capacity.

Other IOC projects are generally concerned with specific phenomena, most of them in particular ocean regions. Investigations are carried out jointly by scientists from one or more countries of the region and by those from states outside the area.

In addition to the IOC, other agencies, such as the World Meteorological Organization (WMO), the UNESCO Division of Marine Sciences, the International Commission for the Scientific Exploration of the Mediterranean Sea (CIESM), and the Committee for the Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP) are active in regional investigations; these frequently interact with IOC, FAO, the UN Environment Programme (UNEP), and other international organizations. These science activities are expensive and funds are often difficult to acquire. They tend to involve scientists from a relatively few countries, with the result that there often seems to be little transfer effect to the developing countries.

In the area of marine pollution control considerable cooperation has taken place. Here, as in the case of fisheries management, data acquisition and coordination are among the first steps, and a number of regional studies have been undertaken, such as those of the North and Baltic Sea under the auspices of ICES. Such data has served as a basis for decision on regulatory action, as evidenced in Northwestern Europe by the 1967

Guatemala, Jamaica, Mexico, Netherlands, Panama, Trinidad and Tobago, USSR, United Kingdom, United States, and Venezuela. Field activities were carried out from 1963 through 1975.

⁵³ Co-operative Investigations in the Mediterranean. Participating countries are Austria, Belgium, Egypt, France, Federal Republic of Germany, Israel, Italy, Lebanon, Malta, Monaco, Morocco, Romania, Spain, Switzerland, Tunisia, USSR, and United Kingdom.

⁵⁴ Participating countries in SOC are Argentina, Australia, Belgium, Brazil, Chile, France, Japan, New Zealand, Norway, South Africa, USSR, United Kingdom, and United States.

⁵⁵ France, Federal Republic of Germany, Republic of Korea, Mauritania, Morocco, Norway, Poland, Portugal, Senegal, Spain, USSR, United Kingdom, and United States participate in CINECA.

⁵⁶ Eight countries participate in CSK. These are China, France, Japan, Republic of Korea, Philippines, Thailand, USSR, and United Kingdom.

Enn Agreement⁵⁷ and the 1972 Oslo Convention,⁵⁸ and in Northeastern Europe by the 1974 Helsinki Convention.⁵⁹

One of the more ambitious regional marine programs is the one undertaken by UNEP for the protection of the Mediterranean from pollution. In February 1975, in collaboration with other organizations, such as FAO, IOC, WMO, and UNDP, UNEP drew up an Action Plan for the Mediterranean, designed to integrate planning of the development and management of the resources of the Mediterranean Basin; to coordinate research, monitoring, and exchange of information programs associated with pollution; and to draft a convention for the protection of the Mediterranean environment.⁶⁰ This led, the following year, to the conclusion of a Convention for the Protection of the Mediterranean Sea against Pollution, a Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, and a Protocol concerning Co-operation in Combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency.⁶¹ In the near future UNEP plans to initiate similar activities in the Caribbean.

Efforts at regional cooperation in the field of technology transfer are still at a preliminary stage. During 1975 and 1976, Working Committee of IOC for Training, Education and Mutual Assistance (TEMA) held ad hoc regional meetings in Mexico City, Casablanca, Manila, and Cairo⁶² in an effort to identify needs and facilities for training, education, and assistance in these regions. The reports of the meetings indicate a mixed reception to this regional concept on the parts both of the developing countries of the respective regions and of nonregional developed state participants.

⁵⁷ Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil, June 9, 1969, 9 ILM 359 (1970).

⁵⁸ Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, February 15, 1972, 11 ILM 262 (1972).

⁵⁹ Convention on the Protection of the Marine Environment of the Baltic Sea Area, March 22, 1974, 13 ILM 546 (1974).

⁶⁰ See UNITED NATIONS ENVIRONMENT PROGRAM, REPORT OF THE INTERGOVERNMENTAL MEETING ON THE PROTECTION OF THE MEDITERRANEAN, Barcelona, 28 January to 4 February, 1975 (UN Doc. UNEP/WG.2/5, Feb. 11, 1975).

⁶¹ United Nations Environment Programme: Final Act of Conference on the Protection of the Mediterranean Sea, 15 ILM 285 (1976). See also Convention for the Protection of the Mediterranean Sea against Pollution, *id.*, at 290; Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, *id.*, at 300; Protocol Concerning Co-operation in Combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency, *id.*, at 306; Resolution Adopted by the Conference, *id.*, at 311. The following sixteen states participated in the Conference on the Protection of the Mediterranean, held at Barcelona in February, 1976, from which the Convention and Protocols emerged: Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Libyan Arab Republic, Malta, Monaco, Morocco, Spain, Syrian Arab Republic, Tunisia, Turkey, and Yugoslavia. Only Albania, of the Mediterranean littoral states, was absent. Syria withdrew before the end of the Conference, but the other fifteen states signed the Final Act.

⁶² *Supra* note 36.

There are other regional arrangements associated with various activities related to the marine environment. The Antarctic Treaty, noted earlier,⁶³ covers the oceans south of 60° S.Lat. as well as Antarctica itself. The 1965 European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories⁶⁴ is a specialized form of arrangement, as is the 1967 Treaty of Tlateloco⁶⁵ calling for a nuclear free zone for Latin America extending for some distance into the Atlantic and Pacific oceans. There are also regional "access to the sea" arrangements, such as the various bilateral and multilateral agreements that have been worked out by land-locked African states with their coastal neighbors.⁶⁶

In summarizing the status of existing marine regional arrangements, it should be noted first that many of them are in the "shared use" category and that such investment of funds, personnel, or jurisdiction as are involved in "complementary use" arrangements are generally of a very limited nature. Only a handful of the regional institutions possess any real regulatory power. "Compensatory use" arrangements appear to be some years away. There are still no "limited use" regimes, except those established by unilateral action, but the advent of the 200-mile economic zone may serve to alter this situation.⁶⁷

A second point concerns the uneven geographic coverage of the maritime areas of the world by regional systems. For the North Atlantic and North Pacific, for example, the variety of arrangements are not only overlapping but tend to call for a wider range of functions than do regional institutions in other parts of the world. Linkages between regional systems in the same geographic area, for the most part, are poorly structured, or nonexistent.

FUTURE DEVELOPMENTS IN MARINE REGIONALISM

The development of future marine regional arrangements turns in some degree on whether an effective treaty emerges from the Third Law of the Sea Conference. The Revised Single Negotiating Text contains nearly three dozen references to regions or subregions.⁶⁸ Most of these are general allusions to organizations, agreements, or cooperation with respect

⁶³ *Supra* note 41.

⁶⁴ European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories, January 22, 1965. 634 UNTS 239.

⁶⁵ See 6 ILM 521 (1967). See also Redick, *Regional Nuclear Arms Control in Latin America*, 29 INT'L ORGANIZATION 415 (1975).

⁶⁶ See Cervenka, *Land-Locked Countries of Africa* (1973).

⁶⁷ See Alexander & Hodgson, *The Impact of the 200-Mile Zone on the Law of the Sea*, 12 SAN DIEGO L. REV. 569 (1975).

⁶⁸ *Supra* note 22. Little thought seems to have been given in compiling the articles of the Revised Single Negotiating Text to the specific operational requirements of regional and subregional arrangements. Some of the regional provisions in the text appear virtually unworkable. In law of the sea negotiations, the regional approach to problem solving seems to have become a favorite fall-back position for otherwise unresolved issues.

to data acquisition, management of fisheries or marine pollution, and the facilitation of scientific research and technology transfer. There are also references to regional representation on the International Seabed Authority. But the most potentially troublesome use of the regional concept is with respect to land-locked and geographically disadvantaged states in terms both of access to the sea and of special fishing rights such states might have in the economic zones of their coastal neighbors.

Even if there is no new treaty, it seems probable that new marine regional organizations and regimes will emerge and that some existing ones will be strengthened. The partitioning of the high seas out to 200 miles from shore into national economic zones and the increased competition for the world's fish resources will lead to complex management problems, which can only be handled by multilateral action. Growing concern over pollution hazards will also contribute to regional cooperation, as will growing demands for rights of access to the sea. Developed countries may come to rely increasingly on regional action for large-scale scientific projects, and some of the developing states (*e.g.*, Mexico and India) will realize the benefits accruing to their own science infrastructure through regional action. And it seems likely that in time multiactivity regimes will be established, particularly for certain semi-enclosed seas.

Future regional arrangements may interact closely with certain geographic areas of the world ocean. For example, joint jurisdictional regimes might be set up for certain international straits, such as Malacca and Hormuz, and perhaps also for certain parts of Antarctica, such as the Antarctic Peninsula. Regional centers may evolve, particularly in developing areas, for such activities as superports, data storage facilities, or marine research. Also, certain islands and island groups, such as Fiji or Mauritius, may come to assume regional roles for midocean areas. A potential regional focal point is Capetown, another is Malta. In time a series of key areas may emerge which will be of considerable import to any system of marine regional groupings.

The question of the benefits countries can reasonably expect from marine regional arrangements depends on the objectives and regulatory functions of the organizations themselves, the viability of their operations, and the investment states are willing to make in the organization's success. With respect both to costs of membership and anticipated returns, there are obviously differences between developed and developing countries. The former, for example, may be concerned about the long-term stability of conditions under which marine-related activities are undertaken; the latter may be more interested in obtaining funds, technical assistance, or similar benefits. One of the difficulties already encountered in regional systems involving developing countries has been the competition among them for shares of the tangible benefits associated with regional cooperation. In which country should a regional research institute, funded by outside sources, be located? What state should operate a regional oceanographic vessel? Yet a converse of this is the argument by some authorities that any funds accruing to the developing countries in coming

years through revenue-sharing arrangements should not be allocated on a country-by-country basis, but should be disbursed through regional development banks or similar agencies which can more effectively spread the benefits among the recipient countries.

The issue of expectation is a complex one. What are some of the benefits associated with regional cooperation? What are the costs to countries located within a geographical region of nonparticipation in a regional regime or organization? What disadvantages are there to states located just beyond the limits of the area covered by a regional system? Once having joined the system, what are the costs of withdrawal? Seen from the standpoint of cost/benefit analyses, regional arrangements may be perceived quite differently by different states, particularly if the arrangements imply relatively long-term commitments on the part of its members.

Assuming the trend toward marine regionalism continues, much as it has in the past, what are the implications with respect to international power relationships? One is a growing competition among major powers for access to regional activities. The Soviet Union, for example, might devise ways for effectively training fishermen or marine scientists from the Red Sea or Persian (Arabian) Gulf areas. As a result, Soviet fishing or oceanographic vessels might find themselves more welcome than vessels of other major maritime countries within these bodies of water. Alternatively, the Chinese might seek the acquiescence of the littoral states to some sort of "closed" regime for the East China and South China Seas.

Associated with this may be the growth of regional leaders which, by various means, would extend their influence throughout an area. A number of such potential leaders are France in the western Mediterranean, Iran in the Persian (Arabian) Gulf, New Zealand in the southwestern Pacific. There may be more than one leader, Mexico and Cuba, perhaps, in the northern Caribbean; Saudi Arabia and Egypt in the Red Sea. If the trend toward regional integration continues, it might be a useful exercise to study the leadership roles individual states may play with respect to marine activities in their geographic area.

A few suggestions may be made in the interest of the effectiveness of future marine regional arrangements.

(1). The diversity of conditions associated with marine regional systems should be recognized by those associated with their operations. Care should be taken, for example, to distinguish between developmental and exclusionary regional regimes, the latter being of great importance to the major maritime powers. The costs associated with proposed arrangements should be analyzed; it is important to note the differences in conditions for marine regional actions between developed and developing countries. Moves toward integration of marine-related activities among the developing countries are slow at best and may require considerable assistance from outside sources.

(2). Regional arrangements should conform as closely as possible to the geographic conditions of the area to which they apply. Of what value is it, for example, to grant to the Central African Republic access rights to

the fisheries of its contiguous coastal neighbors' economic zones, when these zones are extremely small and deficient in living resources? Or why should Zaire be asked to share the fisheries resources of its 300-square mile economic zone with all or some of its five contiguous land-locked states?⁸⁹ And care should be taken to relate any regional system to the physical conditions of the maritime area, such as the unity of fisheries stocks or the movement of ocean currents.

(3). The linkages among regional marine arrangements affecting a certain geographic area should be strengthened. Regional fisheries activities in the Caribbean, for example, should be more closely coordinated with those relating to scientific research. Marine science and technology transfer have much in common. Multiple action programs, such as UNEP's Action Plan for the Mediterranean, should be emulated in other physical marine regions as well.

(4). There is something of a hierarchy of marine regional systems, ranging from simple cooperative agreements to highly integrated regimes. It seems unwise at this time to expect governments to move rapidly along the regulatory scale on matters in which their own vital interests are involved. Multistate regional action involves a long educational process and in only few instances has this process been effectively bypassed.

(5). In future ocean regimes some efforts should be made to work out a uniform set of rules and regulations governing regional action, particularly if the regimes affect the freedom of action of nonmember countries. Nondiscriminatory restrictions should be placed on regional exclusions of outsiders, along with guidelines for processes of interaction between two or more regional systems, or between regional and global organizations or regimes.

A major thrust of this article has been that the structure and functions of marine regional arrangements are highly complex phenomena, on which relatively little systematic analysis has been undertaken. Most arrangements to date have been weak in terms of regulatory functions. Yet statesmen, government planners, and others are coming increasingly to commend regional or subregional solutions to marine-related problems. Often the use of the terms "region" or "subregion" is itself highly ambiguous, and the problems requiring attention may turn out to be susceptible to sound handling at some other organizational level.

Perhaps some of the confusion concerning regional processes could be avoided if it were realized that there are virtually no such things as "natural" multistate regions. The one possible exception involves the case of physical marine regions or subregions where the identity of bordering territories is easily recognized and where the concerns of such territories with the common maritime area involved can be clearly identified.

But "marine-oriented" regions, rather than having a "natural" character of their own, are defined only by the existence of common interests in

⁸⁹ For statistics on the extent of the economic zones which would accrue to each of the coastal states of the world see *Theoretical Areal Allocations of Seabed to Coastal States* . . . in INTERNATIONAL BOUNDARY STUDY, *supra* note 4, No. 46 (1972).

the oceans, such as treaties, agreements, organizations, or other forms of interstate institutions, which serve to bind certain countries together. Where such ties are weak or nonexistent, there is, in effect, no region, *per se*, but merely a group of countries located in various forms of proximity with one another and with the sea. How these countries organize themselves into regional and subregional systems frequently depends on the attitudes and objectives of the affected governments themselves, and on the marine-related problems to be resolved.

If there is one issue this survey highlights it is the need for the development of some general criteria for assessing the viability of current and anticipated marine regional systems. Koers,⁷⁰ in 1973, considered this point with respect to regional fisheries organizations, but his findings did not take into account the impending 200-mile economic zone. Nor was his study intended to consider links between fisheries and other types of marine regional systems.

An assessment of the soundness of regional planning would include, *inter alia*, (1) whether the problem to be resolved can best be handled through some regional mechanism; (2) whether the region or subregion for which the system is intended is a valid geographical area in terms of the objectives of the arrangement; (3) whether the objectives themselves respond effectively to the issues involved; (4) whether the system is capable of carrying out the intended objectives; (5) whether the links between any existing regional activities in the same geographic area are adequately provided for; and (6) whether the effects of the system on the marine environment and on the national ocean interests both of member states and of other concerned countries are sufficiently positive to warrant the costs involved.

This last point may tend to be overlooked in analyses of regional systems. One reason for this may be the difficulty of assessing the national ocean interests of individual states of a region.⁷¹ Another is the general lack, to date, of multidisciplinary approaches to marine regional issues. Clearly the impact of regional systems on maritime areas and resources and on national interests must be seen in conjunction with the new jurisdictional patterns which are emerging—patterns which may ultimately bring over one-third of the world ocean within the limits of national control. As the freedom of the seas concept becomes gradually eroded by economic zone claims and as countries come increasingly to rely on regional approaches to marine-related issues, a whole new set of conditions will emerge with respect to ocean management, conditions for which, as yet, there has been little preparation.

⁷⁰ *Supra* note 44.

⁷¹ See Alexander, *Indices of National Interest in the Oceans*, 1 OCEAN DEV. & INT'L L.J. 21 (1973).

WHAT HAPPENED TO THE UNITED NATIONS MINISTATE PROBLEM?

By Michael M. Gunter *

During the past decade, a number of scholarly analyses of the United Nations ministate problem have appeared.¹ This concern is understandable because the dilemma of ministate representation goes to the heart of the malaise increasingly gripping the world organization: How to square formal voting power with the realities of international politics?² Indeed, no less of an authority than the late Secretary-General U Thant, in his final Annual Report, warned his reluctant audience that the ministate problem "is likely to become more acute in the years to come."³

In the past few years Thant's forebodings, partially at least, have materialized. Since 1973, the Bahama Islands, Grenada, the Cape Verde Islands, the Comoro Islands, São Tomé and Príncipe, and the Seychelles became independent and have been elected to UN membership. (The

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¹ See, for example, the present author's *The Problem of Ministate Membership in the United Nations System: Recent Attempts Towards a Solution*, 12 COL. J. OF TRANSNATIONAL L. 464-86 (1973), and *Liechtenstein and the League of Nations: A Precedent for the United Nations Ministate Problem?* 68 AJIL 496-501 (1974), and the numerous citations therein. In addition, see Jean Chappez, *Micro-états et les Nations Unies*, 17 ANN. FRANÇAIS DE DROIT INTERNATIONAL 541-51 (1971); S. Jayakumar, *Small Nations at the United Nations: The Experience of Singapore*, 3 DENVER J. OF INT. L. AND POLICY 95-106 (1973); M. H. Mendelson, *Diminutive States in the United Nations*, 21 INT. AND COMP. L. Q. 609-31 (1972); and Henning von Wedel, *Der Sogenannte "Mikrostaat" im internationalen Verkehr*, 5 VERFASSUNG UND RECHT IN ÜBERSEE 303-14 (1972). And for a more general analysis, see George L. Reid *The Impact of Very Small Size on the International Behavior of Microstates*, 2 SAGE PROFESSIONAL PAPERS IN INTERNATIONAL STUDIES, No. 02-027 (1974).

For the purposes of this article, a ministate (or microstate) will in general be loosely defined as an independent state with a population of less than 1,000,000. In a few cases, however, a state may have a very small population, but possess an area so large as to make it ludicrous to refer to it as a "ministate." Examples would include Botswana, Gabon, Guyana, Iceland, Oman, Surinam, the United Arab Emirates, and possibly even Guinea-Bissau. For a further elaboration, see the present author's discussion in *The Problem of Ministate Membership*, *supra* 464 n.

Nauru (independent since 1968) remains, with the exception of the Vatican City (a special case), the smallest ministate. It has a population of only 6,500.

² In 1974, the General Assembly established a 42-member committee (subsequently enlarged and its mandate broadened) to study ways of "enhancing the ability of the United Nations to achieve its purposes." Theoretically, of course, this Committee could consider the ministate problem. In practice, however, it is understood that it will not. After its first, four-week session, the Committee reported "that there was a fundamental divergence of opinion on the necessity for carrying out a review of the Charter." *Committee Members Differ on Need to Review UN Charter*, 12 UN CHRONICLE 21 (Aug.-Sept. 1975).

³ *Introduction to the Annual Report of the Secretary-General on the Work of the Organization*, 26 UN GAOR, (No. 1A) 13, UN Doc. A/8401/Add.1 (1971).



latter two, with approximately 70,000 and 57,000 inhabitants respectively, broke all precedents as far as minimal population standards for United Nations membership were concerned.) In the near future it is likely that the Solomon Islands, French Somalia, and the Gilbert Islands, among others, will also gain their independence and seek membership in the world organization.⁴ The process has gone so far as to open up the possibility that some ministates such as Liechtenstein might even reconsider their original decision not to seek membership.⁵

Why has such a situation been allowed to develop? Will this seeming inability to come to grips with the continuing problem of ministates persist? To answer these questions, it will be necessary to retrace the events which have led to the present situation.

More than a decade ago both Secretary-General U Thant and the U.S. representative in the Security Council, Charles Yost, first overtly broached the subject.⁶ A year later the United Nations Institute for Training and Research (UNITAR) approved a research design on the study of small states and territories. Under the able direction of Jacques Rapoport, what remains as the most solid background analysis of the entire problem was then produced.⁷ U Thant made what is undoubtedly the best known statement on the matter when he asserted in 1967 that "it appears desirable that a distinction be made between the right of [ministate] independence and the question of full membership in the United Nations," and recommended that the Organization "undertake a thorough and comprehensive study" of the situation.⁸ Following up the Secretary-General's initiatives, the United States was finally successful in having two plenary meetings of the Security Council called to consider the ministate problem in August 1969.⁹ The Council established a Committee of Experts (the Ministate Committee) to study the entire dilemma and report back its recommendations.

⁴ In addition, a further reservoir of potential ministates exists: secession from already existing states or territories. Anguilla remains perhaps the classic example of the possibilities here. Agitation for secession also has been manifested in such places as the Azores (Portugal), Bougainville (Papua New Guinea), and Mayotte (the Comoros), among others. (In the case of Mayotte, however, the inhabitants apparently desire to maintain their ties with France, rather than become a separate, independent state.)

⁵ If this should occur, some have facetiously suggested that Liechtenstein might then be able to handle Swiss affairs with the world organization.

⁶ See, *Introduction to the Annual Report of the Secretary-General on the Work of the Organization*, 20 UN GAOR, Supp. (No. 1A) 2, UN Doc. A/6001/Add.1 (1965).

⁷ See *STATUS AND PROBLEMS OF VERY SMALL STATES AND TERRITORIES* (UNITAR series, No. 3, 1969). In 1971, a slightly altered version of the study, which brought events up to the end of 1969, was issued as *SMALL STATES AND TERRITORIES: STATUS AND PROBLEMS* (A UNITAR Study by Jacques Rapoport *et al.*). The Carnegie Endowment also produced an able analysis during the same period. See P. BLAIR, *THE MINISTATE DILEMMA*, Occasional Paper No. 6 (1967).

⁸ *Introduction to the Annual Report of the Secretary-General on the Work of the Organization*, 22 UN GAOR, Supp. (No. 1A) 20, UN Doc. A/6701/Add.1 (1967).

⁹ See UN Docs. S/PV.L.1505-06 (1969).

Unfortunately the Ministate Committee reached an impasse, with the results that we live with today. However, since the Committee's meetings were closed and its records restricted to its members,¹⁰ the specifics of this impasse have never been systematically analyzed.¹¹ The main purpose of the present article is to fill this scholarly lacuna by analyzing these records¹² and the UN Legal Counsel's opinion¹³ (also restricted to the Committee members) on the proposals submitted in the Ministate Committee, an opinion which effectively shut the door to any attempts to limit ministate membership.

THE MINISTATE COMMITTEE

From its inception the Ministate Committee was hampered by the sense that, as the British representative warned, it was dealing with a "delicate problem."¹⁴ Any proposal to limit ministate membership might, as Somalia's delegate put it, "reflect . . . a nineteenth century type of mentality favouring weighted membership."¹⁵ Or, as the Burundi representative contended "If the Organization were to pursue a policy of placing its Members in various classifications, it would run the risk of establishing discriminatory criteria which would detract from the sovereign equality of Member States."¹⁶ When the British representative "expressed his delegation's disappointment that only a few delegations had so far taken part in the debate and that even fewer had made suggestions regarding the difficult and delicate problem with which the Committee had to deal" (the Committee had been in existence for the better part of a year and was meeting for the sixth time), the delegate of Burundi retorted that the "matter was an extremely delicate one, since it bore on the question of the equality and sovereignty of States."¹⁷ The Soviet representative agreed that the matter was "a delicate one" and added that it "required

¹⁰ The only exception was an interim report to the Security Council on its work as of June 1970, and issued as 25 UN SCOR, Supp. (Apr.-June 1970) 210, UN Doc. S/9836, Annexes 1-2 (1970). Outside of the proposals of the United States and the United Kingdom for some type of special membership status for ministates, however, this document contains almost nothing of a substantive nature.

¹¹ See, however, the present author's partial analysis in *The Problem of Ministate Membership*, *supra* note 1, at 473-82.

¹² UN Docs. S/AC.16/SR.1-11 (1969-1971).

¹³ UN Doc. S/AC.16/Conf. Room Paper 8 (1971). This document is specifically entitled "Memorandum by the Legal Counsel on the proposal of the United States of America (S/9836, Annex I) and the suggestion of the United Kingdom of Great Britain and Northern Ireland (S/9836, Annex II) regarding special membership for exceptionally small States in the United Nations," and dated July 23, 1971.

Information gathered from numerous personal interviews held at United Nations Headquarters in New York during the summer of 1975 will also be employed. In these instances, however, direct citations are not possible due to the wishes of those being interviewed to remain anonymous.

¹⁴ UN Doc. S/AC.16/SR.2, at 5 (1969).

¹⁵ UN Doc. S/AC.16/SR.9, at 7 (1971).

¹⁶ UN Doc. S/AC.16/SR.6, at 7 (1970).

¹⁷ *Id.*, at 2 and 7.

further study and reflection." As a result, his "delegation had not yet had time to formulate its position on the substance of the question. . . ." ¹⁸ A year later the Soviet delegate could bring himself to say nothing more than that "he would speak on the substance of the question at a subsequent meeting." ¹⁹

When the Committee found it difficult even to reach an accord upon an interim report, the U.S. delegate declared that "after nearly a year's work the Committee should submit some kind of report to the Security Council." ²⁰ The Colombian representative agreed that "the work of the Committee had already suffered serious delays." ²¹ Nevertheless, a half year later, Belgium, France, and Somalia were suggesting that the Ministate Committee dally further by consulting the specialized agencies, jurists, political experts, regional groups, and Third World states. ²² The Argentine representative, one of the few members of the Committee who attempted to accomplish something positive, cautioned that "the Committee could not make others responsible for fulfilling its own tasks." ²³

The U.S. and British Proposals

In the end the Ministate Committee did put forth two substantive proposals one by the United States for the establishment of a category of associate membership and a British proposal for the voluntary renunciation of certain rights and obligations upon admission as a full member. The U.S. proposal would have a ministate associate member:

- (a) enjoy the rights of a Member in the General Assembly except to vote or hold office;
- (b) enjoy appropriate rights in the Security Council upon the taking of requisite action by the Council;
- (c) enjoy appropriate rights in the Economic and Social Council and in its appropriate regional commission and other subbodies, upon the taking of requisite action by the Council;
- (d) enjoy access to United Nations assistance in the economic and social fields;
- (e) bear the obligations of a Member except the obligation to pay financial assessments.

The admission to Associate Membership in the United Nations will be effected in accordance with the same procedures provided by the Charter for the admission of Members. States which opt for Associate Membership would submit to the Secretary-General a declaration of willingness to abide by the principles of the United Nations, as set forth in the Charter. ²⁴

¹⁸ *Id.*, at 5.

¹⁹ UN Doc. S/AC.16/SR.11, at 7 (1971). Such a "subsequent meeting" never occurred.

²⁰ UN Doc. S/AC.16/SR.6, at 9 (1970). ²¹ UN Doc. S/AC.16/SR.7, at 5 (1970).

²² UN Doc. S/AC.16/SR.9, *passim* (1971). ²³ UN Doc. S/AC.16/SR.10, at 6 (1971).

²⁴ 25 UN SCOR, Supp. (Apr.-June 1970) 211, UN Doc. S/9836, Annex 1 (1970).

The British proposal was drawn up in the form of a declaration which a ministate could make:

The State of hereby applies for membership of the United Nations in accordance with Article 4 of the Charter.

In submitting this application, the State of expresses its desire to enjoy the privileges and assume the obligations of membership of the United Nations and to be accorded the protection and assistance which the United Nations can provide, in particular with regard to the maintenance of its territorial integrity and political independence; and declares that it does not wish to participate in voting in any organ of the United Nations, nor to be a candidate for election to any of the three Councils established by the Charter or to any subordinate organ of the General Assembly.

On this basis and on the understanding that the assessment of its financial contribution would be at a nominal level, the State of declares that it accepts the obligations contained in the Charter of the United Nations and solemnly undertakes to fulfil them.²⁵

Later, when it was argued that a state which had voluntarily renounced its right to vote ought to be able to recover it, the United Kingdom added the following paragraph to its formula:

The State of further understands that it may at any time, after the expiration of one year's notice to the Secretary-General of its intention to that effect and after its acceptance of a revised assessment of its financial contribution, avail itself of those rights of membership the exercise of which it has hereby voluntarily renounced.²⁶

Both the United States and the United Kingdom stressed the *voluntary* nature of their respective proposals. The U.S. representative, for example, argued that "his delegation's proposal in no way affected the sovereign right of the micro-States themselves to decide the form of relationship with the United Nations for which they wished to make application."²⁷ And the British delegate said that "the very purpose of the [his] proposal was to offer an option that could be exercised voluntarily by sovereign States."²⁸ As for those ministates which were already members of the Organization, one U.S. State Department official explained:

I do wish to stress that no present UN member would be in any way affected by the establishment of some form of associate status unless it should itself decide, and this I do not preclude, to withdraw from UN membership and seek associate status instead.²⁹

Reaction to the Proposals

As indicated above, the main characteristic of the discussions held in the Ministate Committee was a simple, general hesitancy to deal with

²⁵ *Id.*, Annex 2.

²⁶ UN Doc. S/AC.16/SR.11, at 5 (1971).

²⁷ UN Doc. S/AC.16/SR.5, at 4 (1970).

²⁸ UN Doc. S/AC.16/SR.9, at 9 (1971).

²⁹ Letter from John A. Armitage (Director of the Office of United Nations Political Affairs, United States Department of State) to the author, dated November 15, 1971.

the problem. What substantive debate over the U.S. and British proposals there was covered by two general areas: (1) Did they necessitate a Charter amendment? and (2) Who would be eligible (or liable) for associate membership or voluntary renunciation of their rights and obligations? In other words what is a ministate? Both were extremely important questions.

(1) Charter amendment. Virtually nobody wanted to open this Pandora's box. The Soviet representative summed up the feelings on this score by asserting that "his delegation understood that . . . [there] was a general feeling among the members of the Committee that it was undesirable to amend the Charter," adding that "[h]is delegation was opposed as a matter of principle to amending the Charter. . . ." ³⁰

The reason for this reluctance to amend the Charter is not difficult to understand. The very existence of the United Nations was predicated on a delicate balance maintained by some 130 odd sovereign states. An amendment that might be interpreted as challenging the sovereign equality of states—despite the noblest of intentions—could not help but result in the bitterest rancor and suspicion. What had begun as a sincere and innocent attempt to solve the specific problem of ministate membership, might then have snowballed into a fundamental struggle over the very nature and even existence of the Organization. Rather than risk this eventuality, almost everybody was adamant in their opposition to amendment.

Somewhat optimistically, both the United States and the United Kingdom assured the Committee that an amendment of the Charter would not be necessary. According to the United States:

[t]he powers conferred on the General Assembly in Articles 10 and 11(2) of the Charter, together with the fact that under Charter Article 21 the Assembly adopted its own rules of procedure, established the right of the Assembly to create a category of Associate Member States having some, but not all, of the rights of membership.³¹

The British defended their proposal by arguing that:

If, in voluntary exercise of its sovereignty, a State, as part of its request for membership, renounced the exercise of certain rights of membership in a manner acceptable to the Organization and its other Members, that would not be contrary to the provisions of Article 2(1) of the Charter, which was designed to safeguard the sovereign equality of all Members. The situation would simply reflect the free and sovereign choice of the State concerned and the recognition and acceptance by the Organization of the choice so made.³²

Most of the other members of the Ministate Committee did not agree with this reasoning. As the French representative put it: "Many delegations, including his, doubted whether the proposals before the Committee, particularly those submitted by the United States and United Kingdom delegations, were compatible with the Charter, given the very

³⁰ UN Doc. S/AC.16/SR.7, at 3-4 (1970). ³¹ UN Doc. S/AC.16/SR.10, at 5 (1971).

³² UN Doc. S/AC.16/SR.6, at 3 (1970).

clear meaning of certain of its Articles."³³ Even the Argentine delegate declared that, while the American proposal "was doubtless very attractive superficially . . . other delegations had taken serious issue with that interpretation; nor was his own delegation convinced that it was correct." He observed that "other international organizations had been obliged to amend their respective statutes to include a category of 'associated membership.'" ³⁴

(2) Definition of a ministate. Both the U.S. and the British proposals eschewed a specific definition of the term "ministate." This omission prompted the Argentine representative to assert, near the end of the Ministate Committee's eleventh and final meeting, something which one might have supposed would have been voiced much earlier: "What was needed now was a definition of 'micro-State' and a list of existing and potential 'micro-States' which might apply for membership. . . ." ³⁵

This lack of a definition, of course, simply reflected the political impossibility of defining the term for the purpose of some type of associate membership. Most of the ministates were, after all, the products of decolonization. They viewed full membership in the Organization as, in a sense, the final stamp of approval on their independence. In addition most of the Third World majority felt that further ministate membership would simply add to their preponderance in the United Nations. Given these factors then, opposition to the membership of ministates could be easily equated to neoimperialism, an onus no one wanted to bear. As the representative of the United States acknowledged, his delegation's preferences "had met with little support in view of the [political] difficulties involved in the codification of even suggested minimum criteria for membership." ³⁶

In addition any definition would be inherently arbitrary. There was no clear dividing line separating ministates from other states. During the Committee's discussions, for example, the French delegate observed that the UNITAR study of the problem "had concluded that there were many ways of defining a micro-State or micro-territory, all of them more or less arbitrary." He suspected "that the Committee would have great difficulty in producing any definition at all of a micro-State." ³⁷

³³UN Doc. S/AC.16/SR.10, at 10-11 (1971).

³⁴*Id.*, at 5. In retort the U.S. representative "pointed out that no provisions had been made in the Charter for observers; the practice of sending observers had developed with the evolution of the Organization." UN Doc. S/AC.16/SR.11, at 6 (1971).

³⁵UN Doc. S/AC.16/SR.11, at 8 (1971). For such a listing, see RAPOPORT *et al.*, *supra* note 7, at 36-38; and BLAIR, *supra* note 7, at 75-83.

³⁶UN Doc. S/AC.16/SR.11, at 2-3 (1971).

³⁷UN Doc. S/AC.16/SR.10, at 10 (1971). In the UNITAR study see, in particular, the contribution by Charles Taylor, *Statistical Typology of Micro-States and Territories: Towards a Definition of a Micro-State*. Taylor's piece also appears in 8 *SOCIAL SCIENCE INFORMATION*, 101-17 (1969).

As the French delegate noted, Taylor's work makes it clear that any specific definition of a ministate must be, in the final analysis, arbitrary. Several other observers have come to a similar conclusion. See, for example, the present author's lengthy dis-

These difficulties notwithstanding, the U.S. representative still maintained "that the existence of exceptionally small States which were unable to meet the financial obligations of membership in the United Nations was a fact that could not be denied."³⁸ He argued that "though it would be useful to have express criteria . . . in view of the difficulties involved . . . [the United States] did not consider that it was necessary to spell out the criteria." Accordingly, "[i]t would . . . be sufficient to make a clear recommendation that the Security Council should exercise its discretion in granting associate membership to [mini-]States. . . ." ³⁹ After all, he contended, "even under the terms of Article 4(1) of the Charter, the Security Council was required to exercise its judgment since, for example, there was no formal definition of 'peace-loving state.' " ⁴⁰

If the arguments of the United States on this point were accepted, however, "neither its [the United States] proposal nor that of the United Kingdom [necessarily] should be confined exclusively to micro-States." ⁴¹ In other words, as the delegate from Syria observed, "it was important to consider the possibility that a large number of States would wish to enjoy the benefits of membership without assuming their share of the financial burden." ⁴² "[W]hat would be the financial implications for the United Nations if a large number of countries wished to avail themselves of that type of association," asked the Nicaraguan representative.⁴³

To this the British delegate replied:

Members [of the United Nations] could rest assured that States which were able to pay would be assessed under the normal procedures and would not be relieved of their financial obligations by the General Assembly even though they might wish to abstain from the exercise of certain rights.⁴⁴

And the U.S. representative too argued that:

Associate membership or status was not intended to allow countries to have the option to pay or vote. . . . It should not provide a soft option for a country in temporary financial straits wishing to economize since that would be contrary to the Organization's financial rules.⁴⁵

cussion in *Ministates and the United Nations System*, 73-145 (unpublished Ph.D. dissertation in the Kent State University Library, 1972).

³⁸ UN Doc. S/AC.16/SR.10, at 10 (1971).

³⁹ UN Doc. S/AC.16/SR.11, at 2-3 (1971).

⁴⁰ *Id.*, at 3. Article 4(1) declares that:

Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

⁴¹ *Id.*, at 6.

⁴² UN Doc. S/AC.16/SR.6, at 7-8 (1970).

⁴³ *Id.*, at 6.

⁴⁴ UN Doc. S/AC.16/SR.11, at 4 (1971).

⁴⁵ *Id.*, at 6. The United States delegate specifically cited Articles 17 and 19 of the Charter.

Decision to Consult Legal Counsel

Given these substantive differences, the Ministate Committee decided to seek the advice of the UN Legal Counsel, an idea first broached nearly a year earlier.

The Legal Counsel is hereby requested to inform the Committee if, in his opinion, the proposal made by the United States (S/9836, annex I) and the suggestion made by the United Kingdom (S/9836, annex II) can be implemented within the framework of the Charter of the United Nations without requiring amendment thereof.⁴⁶

The Argentine delegate, sitting as the Chairman of the Ministate Committee for that meeting, elaborated further upon this request.

In consulting the Legal Counsel, the [Ministate] Committee would not be asking him to define the concept of a micro-State but simply to give an advisory opinion on the United States and United Kingdom proposals. In other words, he would be asked to answer the following questions: Was it possible to create a category of associate membership without having to amend the Charter? Could a State have associate status with the United Nations by renouncing certain rights in order, in return, to be exempted from certain obligations?⁴⁷

Replying to the objections of certain members such as the Soviet Union, the Chairman declared that: "The Legal Counsel's opinion would in no sense be binding in character, and, in the final analysis, it would be for the Committee to define the concept of a micro-State."⁴⁸

THE OPINION OF THE LEGAL COUNSEL

In his opinion, the Legal Counsel (1) examined the compatibility with the Charter of both the U.S. and the U.K. proposals, and then (2) devoted the bulk of his analysis to a review of the legal texts and practice of the United Nations concerning the participation of nonmember states in the proceedings of the Organization.

U.S. Proposal

The United States had proposed the establishment of a status of United Nations Associate Member. (See above.) "What would be the exact status of an 'associate member' *vis-a-vis* the Charter? Would such an 'associate member' . . . be a party to the Charter?" the Legal Counsel asked.⁴⁹ He replied:

Article 4 of the Charter [which defines the conditions for admitting new members to the United Nations] makes no reference to "associate membership" or to "associate members", nor do these terms appear

⁴⁶ UN Docs. S/AC.16/SR.10, at 7 (1971), and S/AC.16/Conf. Room Paper 8, at 1 (1971).

⁴⁷ UN Doc. S/AC.16/SR.10, at 9 (1971). ⁴⁸ *Id.*

⁴⁹ UN Doc. S/AC.16/Conf. Room Paper 8, at 4 (1971).

elsewhere in the Charter. . . . [I]t is not possible, without Charter amendment, to create some other means of becoming a party to that instrument or of becoming a party in a capacity other than that of a Member.⁵⁰

The Legal Counsel further elaborated:

It is significant to recall, in this connexion, that certain of the specialized agencies, such as the Food and Agriculture Organization and the United Nations Educational, Scientific and Cultural Organization, which had no provisions for associate membership in their original constitutions, deemed it necessary to adopt such provisions through the amendment procedure provided in those constitutions.⁵¹

Given the above reasoning, an "associate member," as defined by the U.S. proposal, "for the present purposes . . . must be considered a 'non-member' as the Charter now reads."⁵² Yet the proposal would permit these nonmembers to "enjoy the rights of a Member in the General Assembly except to vote or hold office." Such rights, which "an associate non-member" might enjoy, would include an unlimited prerogative of participation in the plenary debates of the General Assembly and of proposing items for its agenda.

In the past, however, nonmembers have enjoyed extremely limited rights of participation in plenary proceedings. In addition Article 9(1) of the Charter provides that: "The General Assembly shall consist of all the Members of the United Nations." The Legal Counsel concluded that "Article 9 of the Charter . . . would have to be amended by the addition of the words 'and all the associate members' if the [U.S.] proposal, in its present form, were to be put into effect." Otherwise, "there would appear to be no limitation whatsoever on the Assembly's powers to alter its composition, by adding extra categories of members, without recourse to the amendment procedure of the Charter."⁵³ Furthermore, the Legal Counsel noted, the rights of nonmembers to submit questions to the General Assembly are circumscribed by the provisions of Charter Articles 11(2) and 35(2). "The limitations of those articles would have to be removed, through Charter amendment, if the [U.S.] proposal were to be implemented in its present form."⁵⁴

The U.S. proposal also stated that an associate member would "enjoy appropriate rights in the Security Council . . . and the Economic and Social Council." But, pointed out the Legal Counsel, Article 32 of the Charter lays down the conditions of participation for nonmembers in the Security Council. "It would not be possible, without Charter amendment, to accord general rights to 'associate States' in excess of those specified in that Article."⁵⁵ As for the Economic and Social Council, Article 69 of the Charter confines the automatic rights of participation, without vote to members of the United Nations. "Should it be the intention to accor-

⁵⁰ *Id.*, at 4-5.

⁵² *Id.*, at 5-6.

⁵⁴ *Id.*, at 7.

⁵¹ *Id.*, at 5.

⁵³ *Id.*, at 6.

⁵⁵ *Id.*

a similar right to 'associate members' the question will therefore arise of the necessity of amending Article 69."⁵⁶

Finally, the Legal Counsel doubted whether it would be feasible to exempt the proposed associate members from making a financial contribution. Although admitting that under Article 17(2) the General Assembly "may well be . . . free to decide not to levy any assessment against such [associate] members," he added that:

It has, however, usually been the practice in the past to levy assessments against non-member States which participate in certain of the subsidiary organs of the United Nations, in accordance with criteria which are generally applicable to Member States in assessing the percentage they should pay towards the budget of the Organization.⁵⁷

U.K. Proposal

Under the U.K. proposal (or suggestion), ministates would become full members of the United Nations but voluntarily renounce the right to vote or hold office in the Organization. They also would be financially assessed at only a nominal level.

Some believed that, compared to the U.S. proposal, the British proposal more adroitly avoided the problem of specifically defining a ministate, and, in addition, was less likely to necessitate a Charter amendment, because, under it, ministates would be admitted as *full* (not associate) members which merely had voluntarily renounced certain rights of membership. The Legal Counsel conceded that the British proposal "does not present the same difficulties as the United States proposal in respect of Article 9 of the Charter concerning the composition of the General Assembly in that the suggestion [of the British] admits the [mini-]States concerned to [full] membership in the Organization."⁵⁸

Nevertheless, the Legal Counsel queried whether the British proposal would be compatible with Article 4 of the Charter in that states would be admitted to membership in the United Nations which, in being financially assessed at a nominal level, might be deemed thus unable to carry out the financial obligations of the Charter. Furthermore, Article 18(1) asserted that: "Each member of the General Assembly shall have one vote." Although the British proposal provided for a voluntary renunciation of the right to vote, "the question arises whether such a renunciation accords with the letter and spirit of the Charter."⁵⁹ What is more,

⁵⁶ *Id.*

⁵⁷ *Id.*, at 8. Article 17(2) provides that: "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly."

⁵⁸ *Id.*, at 10. In the Stanley Foundation's Conference on ministates and the United Nations at the Carnegie International Center in New York city September 9-10, 1974, the idea of "voluntary renunciation" was the "one to which the most attention was given." STANLEY FOUNDATION, *MINI-STATES AND THE UNITED NATIONS*, 17 (1974).

On the other hand, the British suffered throughout from a partial conflict of interest, since they were committed, in one way or another, to support the membership applications of their former colonies.

⁵⁹ UN Doc. S/AC.16/Conf. Room Paper 8, at 11 (1971).

Article 19 specified the conditions under which "a Member of the United Nations . . . shall have no vote. . . ." "Can new and unrelated conditions for loss-of vote by a Member State be created without Charter amendment?" the Legal Counsel asked.⁶⁰

In addition Article 2(1) declares that: "The Organization is based on the principle of the sovereign equality of all its Members." A "consequence" of this proviso, asserted the Legal Counsel, "is the equality of essential rights and obligations under the Charter." Accordingly, "[g]rave doubts arise as to the propriety of a Member State renouncing, in a legally binding form, its fundamental Charter rights. While such a State may remain 'sovereign' it hardly remains 'equal.'"⁶¹ Elaborating further, the Legal Counsel wondered whether the British proposal might not open the door to the unraveling of the Charter obligations themselves: "If fundamental rights can be renounced, can fundamental obligations also be given up (such as the obligation to settle international disputes by peaceful means)?"⁶²

The Legal Counsel also found difficulties with the British proposal for renouncing the right to be considered for elections to the various organs of the United Nations. "Once again, it would appear that a fundamental right flowing from membership is being precluded, and it is immaterial that this arises in the first instance from a voluntary renunciation. There are surely certain fundamental rights which cannot be renounced."⁶³ What is more, it should be noted that under the existing rules, ministates might become members, with *full* rights, of UN subsidiary organs simply by virtue of their membership in one of the specialized agencies. If the British proposal were to be implemented, it "may therefore require some modification of the basic decisions establishing these [UN subsidiary] organs and the loss of an existing right."⁶⁴

Although granting that "Article 17, paragraph 2, leaves the Assembly with a wide discretion in apportioning expenses," the Legal Counsel argued that the "question arises whether the renunciation[s] envisioned by the British proposal] . . . are rationally factors to be considered when apportioning expenses."⁶⁵ Furthermore, under the British proposal, "a Power which could not in any way be characterized as a micro-State could also obtain a nominal assessment by making the necessary renunciation." Once again opening up the entire question of what precisely constitutes a ministate, the Legal Counsel asked: "If such arrangements are to be made available to certain Member States, can they validly be denied to other Member States? Where is the line to be drawn?"⁶⁶

Recommendations

"The U.S. proposal and the U.K. suggestion cannot, as they presently stand, be implemented within the framework of the United Nations, with-

⁶⁰ *Id.*, at 13.

⁶² *Id.*

⁶⁴ *Id.*

⁶⁶ *Id.*, at 13.

⁶¹ *Id.*, at 11.

⁶³ *Id.*, at 12.

⁶⁵ *Id.*, at 12-13.

out amendment of the Charter," concluded the Legal Counsel.⁶⁷ Nevertheless, "the rationale" of these two proposals "can be otherwise achieved" in that "an association other than membership with the Organization" already exists. This "association" is based on "facilities . . . which derive from the Charter and from the decisions of United Nations organs" and gives "to what might be called [ironically enough, given the criticism of the United States proposal] 'associate States' a very wide range of possibilities for participating in almost every field of United Nations work, in many instances with rights identical to those of Member States."⁶⁸ Indeed, the bulk of the Legal Counsel's opinion was given to an analysis of this "association."

The Charter provisions; the rules of procedure, and practice of the General Assembly and its main committees, subsidiary organs, and conferences it convenes; the Security Council; the Economic and Social Council and its subsidiary organs; the Trusteeship Council; and the International Court of Justice were all systematically examined. One key finding, in light of the criticisms made of the U.S. proposal, was that in the General Assembly, "while non-member States may be heard in a Main Committee, they do not participate in proceedings of the plenary . . . except in the case of elections to the International Court of Justice and amendments to the Statute. . . ."⁶⁹ The analysis ended with the Legal Counsel noting that although there "has developed in practice under the Charter what might be called an 'associate status' . . . [t]his development has been *ad hoc*, and has not been generally systematized."⁷⁰

Therefore, the Legal Counsel suggested that:

It would be possible, on the analogy of what now exists, for the competent principal deliberative organs, within the limits set by the Charter, to define in a set of principles, possibly to be known as "associate status", the terms and conditions under which non-Member States may participate in their proceeding and the proceeding of their subsidiary organs or may formally observe such proceedings. . . .⁷¹

He added that the "General Assembly could lay down the assessment, if any, to be paid by an 'associate State,'" and even proposed that the Security Council might define "general criteria indicative of the size and population of the States to which it is considered particularly appropriate that 'associate status' should apply."⁷² "It would be understandable," he noted, "if some figures for population smaller than that of the Member State now having the least population were to be chosen."⁷³

Ironically enough, the Legal Counsel admitted that his recommendation "presents similarities to the United States proposal,"⁷⁴ and that "at the

⁶⁷ *Id.*, at 55.

⁶⁸ *Id.*, at 14-15.

⁶⁹ *Id.*, at 17.

⁷⁰ *Id.*, at 56.

⁷¹ *Id.* How nonmember states possessing an "associate status" might "participate in their [the principal deliberative organ's] proceedings," given the criticism of the U.S. proposal, is not made clear, however.

⁷² *Id.*, at 56-57.

⁷³ *Id.*, at 56n.

⁷⁴ *Id.*, at 57.

eleventh [and final] meeting of the Committee . . . the representative of the United States spoke interchangeably of an 'associate status' or 'associate membership. . . .'⁷⁵ He argued, however, that his recommendation "would be designed to avoid those points in the [U.S.] proposal which are not compatible with the Charter as it now stands."⁷⁶

CONCLUSIONS

The effect of the Legal Counsel's opinion was to extinguish what little enthusiasm remained in the United Nations for seriously examining the ministate problem. Although the Ministate Committee could theoretically be called back into session and has yet to "submit a further report,"⁷⁷ which it promised in its one public document, it is understood that the issue, if not the problem, is dead. Any final report would be superfluous, as well as embarrassing.

At first glance this state of affairs would seem to be somewhat inexplicable, especially in light of the Legal Counsel's recommendations for creating what he himself termed an "associate status." Despite his resounding conclusion that the U.S. proposal was incompatible with the Charter as it now stands, he would seem to have recommended a procedure strikingly similar to the one he had just rejected.

While this is true, it would appear that the Legal Counsel was also simply reciprocating the Security Council's "passing of the buck." He recommended that the other "competent principal deliberative organs" (specifically the Security Council and the General Assembly) define an "associate status." Since to do so formally was politically impossible, the matter was simply dropped.

Accordingly, it is virtually certain that the United Nations will not take any formal steps to limit ministate membership. (Although the United States recently vetoed the membership applications of Angola and Vietnam, it is understood that the United States will not use this procedure in the case of ministates.) Many feel that ministate membership per se has not affected materially the overt decisionmaking process in the United Nations that much anyway.⁷⁸

In addition some new Pacific ministates have opted out of membership in the Organization,⁷⁹ while a few potential ministates have recently

⁷⁵ *Id.*, at 57n.

⁷⁶ *Id.*, at 57.

⁷⁷ 25 UN SCOR, Supp. (Apr.-June 1970) 211, UN Doc. S/9836 (1970).

⁷⁸ This conclusion is based on a number of personal interviews held at the Organization during the summer of 1975. For a recent empirical verification of it, see Joseph R. Harbert, *The Behavior of the Ministates in the United Nations, 1971-1972*, 30 INT. ORG. 109-27 (1976). In addition, see the comments to this effect made at the Stanley Foundation Conference, *supra* note 52, at 12-13.

On the other hand, one continues to wonder about the more latent effects ministate membership has on the willingness of larger states to entrust the United Nations with a more meaningful role.

⁷⁹ For a general discussion of "the Pacific way," see Peter J. Boyce and Richard A. Herr, *Microstate Diplomacy in the South Pacific*, 28 AUSTRALIAN OUTLOOK 24-35 (April 1974).

been integrated into much larger states. In the spring of 1975, for example, India incorporated Sikkim, while Indonesia has apparently gobbled up East (Portuguese) Timor. The Cape Verde Islands, admitted to the United Nations in the fall of 1975, may ultimately unify with Guinea-Bissau and allow its individual membership to lapse. (Another ministate, Zanzibar, did just this when it merged with Tanganyika in 1964.) Indeed, when the Security Council favorably considered the membership application of the Cape Verde Islands in August 1975, the British delegate expressed some concern about the close relationship existing between it and Guinea-Bissau: "it would obviously be out of the question for one State to exercise the rights of another in the world body. Any such arrangement would create most undesirable precedents."⁸⁰

Niue, still another potential ministate, formally entered into a state of "free association" with New Zealand (à la the Cook Islands) in 1974. The Organization officially recognized this new relationship as an act of "self-determination in accordance with the principles of the Charter . . . and the Declaration on the Granting of Independence to Colonial Countries and Peoples,"⁸¹ an encouraging sign given the inherent suspicion of any status less than total independence. Micronesia too is moving towards some type of association with the United States, although the details have yet to be finalized. Nevertheless, several more ministates are likely to join the United Nations in the coming years.

⁸⁰ *Council Recommends Three African States for United Nations Membership*, 12 UN CHRONICLE 8 (Aug.-Sept. 1975).

⁸¹ See G.A. Res. 3285, 29 UN GAOR, Supp. (No. 31) 98, UN Doc. A/9631 (1974).

NOTES AND COMMENTS

THE KIEV AND THE TURKISH STRAITS.

On July 18, 1976, the Soviet naval vessel, *Kiev*, transited the Turkish Straits from the Black Sea to the Mediterranean, with Turkish consent.¹ Questions have been raised concerning the international legality of this transit, and in light of earlier reaction to an alleged violation by the Soviet Union of the rules on the passage of submarines through the Turkish Straits² it seems appropriate to examine the facts and the governing law.

The *Kiev* is a 35-40,000 ton vessel built at the Soviet Black Sea port of Odessa and fitted out at Nikolayev. The ship is 925 feet in length, 200 feet in breadth, and has an angled flight deck approximately 580 feet long and 90 feet wide.³ Her maximum speed is estimated to be in excess of 30 knots, and she is classified by the Soviet Union as "Protivo Lodochny Kreyser," meaning antisubmarine cruiser.

The *Kiev's* armament consists of two twin SAN-3 missile launchers for Goblet missiles (surface-to-air missiles with a range of 20 miles); possibly three or four SAN-4 surface-to-air missile launchers; one antisubmarine ("ASW") twin launcher; eight SS-N-3 surface-to-surface missiles with a range of 150-200 miles; 28 pieces of 76 mm, 57 mm, and 25 mm conventional artillery; and additional conventional ASW launchers.

The *Kiev* is designed to carry 25 to 30 fixed wing aircraft, probably the vertical takeoff and landing (VTOL) Yak-36, designated by NATO as "Freehand." It can also simultaneously carry 25 to 30 antisubmarine helicopters. The military journalist Drew Middleton, writing in the *New York Times*, states that the Yak-36 fighters are "expected to provide seaborne air cover for the [Soviet Mediterranean] squadron for the first time [and] [i]n war, these fighters would attack aircraft aboard the two American carriers that are normally part of the Sixth Fleet in the Mediterranean."⁴ Middleton notes further that "[u]ntil the advent of the *Kiev*, the Soviet squadron would have had to rely on aircraft flying from the Soviet Union or, possibly, from Syrian bases for air support.

According to news reports, the Soviet Union gave advance notice, as required by the Montreux Convention,⁵ to Turkey of the passage of the *Kiev*, describing the vessel as an antisubmarine cruiser. The Anatolian

¹ N.Y. Times, July 19, 1976, at 4, col. 4; Washington Post, July 19, 1976, at A-16, col. 1.

² N.Y. Times, Feb. 8, 1976, at 1, col. 7.

³ This and subsequent data about the *Kiev* was taken primarily from J. Moore (ed.) JANE'S FIGHTING SHIPS 1975-76, at 551 (1976).

⁴ N.Y. Times, July 22, 1976, at 3, col. 1.

⁵ Convention concerning the Régime of the Straits, signed at Montreux, July 20, 1936, 173 LNTS 215, 31 AJIL, Supp. 1 (1937). States party to the Convention are Bulgaria, France, the United Kingdom, Greece, Japan, Romania, Turkey, Yugoslavia, and the Soviet Union.

news agency reported that Turkey was advised that the vessel in transit carried approximately 30 airplanes and 25 helicopters.⁶ The *Kiev* passed through the Bosphorus, the Sea of Marmara, the Dardanelles, and the Aegean Sea, finally taking up station south of Crete. A few days later the vessel moved out of the Mediterranean into the North Atlantic Ocean.

Two principal issues are presented by the *Kiev's* transit: (1) Does the Montreux Convention, which governs passage through the Turkish Straits, prohibit transit by aircraft carriers as a class of vessel; and (2) if so, is the *Kiev* an aircraft carrier within the terms of the Montreux Convention?

Article 8 of the Montreux Convention provides that "the definitions of vessels of war and of their specification . . . shall be as set forth in Annex II." Annex II defines six categories of vessels, *viz.*, capital ships, aircraft carriers, light surface vessels, submarines, minor war vessels, and auxiliary vessels.

Article 10 of the Convention provides that in time of peace three of these categories—light surface vessels, minor war vessels, and auxiliary vessels—shall enjoy freedom of transit through the Straits whether belonging to Black Sea or non-Black Sea powers. Article 11 then provides that Black Sea powers only may send *capital ships* of an aggregate tonnage greater than 15,000 tons through the Straits,⁷ provided that they pass singly and are escorted by not more than two destroyers. Article 12 provides for the passage of Black Sea powers' submarines under specified restrictions relating to site of construction or purchase, time of day, and mode of navigation. There is, however, no provision in the body of the Convention covering aircraft carriers.

In view of the language of Article 10 that vessels of war other than light surface vessels, minor war vessels, and auxiliary vessels are to enjoy rights of transit *only* under the special conditions of Articles 11 and 12 (dealing with capital ships and submarines), it is logical to conclude that in the absence of an authorizing article covering aircraft carriers, the passage of such ships belonging to Black Sea powers is forbidden.

Two counterarguments to this "four corners" analysis need to be considered. First, Article 15 provides that vessels of war in transit "shall in no circumstances make use of any aircraft which they may be carrying." However, the fact that capital ships and other vessels often carry scout aircraft launched by catapult and recovered from the sea indicates that this article cannot be read as referring exclusively to aircraft carriers. Second, aircraft carriers cannot be considered as a variety of "capital ship," since the definition of the latter class in Annex II specifically excludes air-

⁶ The Associated Press wire story contained this reference to the Anatolian report. The *New York Times* (*Reuters*) story, *supra* note 1, stated that "the *Kiev* was not fully operational, having no aircraft on board," but the *Washington Post* (Special), *supra* note 1, corroborated the AP release, noting that "the *Kiev* was believed to be carrying 25 to 30 warplanes and a similar number of helicopters when it passed under the Bosphorus Bridge."

⁷ The permitted tonnage of non-Black Sea powers in the Straits and the Black Sea is dealt with in Articles 14 and 18 and is not relevant to this analysis.

craft carriers. ("Capital Ships are surface vessels of war . . . other than aircraft carriers.")

A review of the history of the Turkish Straits, particularly the Treaty of Lausanne (1923) and the Montreux Convention (1936),⁸ does not provide any indication of the intent of the negotiators with respect to aircraft carriers. Likewise, it is not possible to say that the *sole* object of the treaty was either to facilitate egress for Black Sea powers or to provide ingress for non-Black Sea powers. Rather, the history of the negotiations indicates that the Montreux Convention was a compromise between Black Sea and non-Black Sea powers, with neither having a preferential position; a balance was struck between absolute freedom of navigation and the complete prohibition of transit of warships through the Straits.

To summarize quite briefly, Soviet Russia was dissatisfied with the provision of the Lausanne Convention of 1925 concerning freedom of passage through the Straits, preferring their closure in order to avoid entry of stronger naval powers into the Black Sea. With the improvement of Turkish-Soviet relations during the 1930's, a revision of the Lausanne Convention was undertaken. Turkey submitted a draft which was extremely favorable to the Soviet Union and which would have given Turkey substantial if not absolute control over navigation in the Straits; a position desired by the Soviets who felt their interests in the Straits could best be served by direct bilateral arrangements with Turkey. The United Kingdom objected to the Turkish proposal, with the result that the Montreux Convention was essentially a compromise negotiated by British and Soviet representatives over a two-week period. That being the case, it can only be said that the resulting treaty served the interests of both positions—facilitating Black Sea powers' transit to the Mediterranean and securing for non-Black Sea powers a right of navigation through the Straits into the Black Sea, *both* hedged about with negotiated restrictions.

Thus, in spite of the general statement in Article 1 that the parties to the Convention "recognize and affirm the principle of freedom of transit and navigation by sea in the Straits," the history of the negotiations makes it clear that some restrictions were intended to be placed on navigation both by Black Sea powers and by other nations. It is therefore not inconsistent with this intent to conclude that transit of aircraft carriers of the Black Sea powers is forbidden by the Convention.

Is the *Kiev* an aircraft carrier? The Montreux Convention (Annex II) defines aircraft carriers as:

[S]urface vessels of war, whatever their displacement, *designed or adapted primarily for the purpose of carrying and operating aircraft at sea*. The fitting of a landing-on or flying-off deck on any vessel of

⁸ See J. SHOTWELL AND F. DEÁK, *TURKEY AT THE STRAITS: A SHORT HISTORY* (1940); F. VÁLI, *THE TURKISH STRAITS AND NATO*, ch. 3 (1972); Routh, *The Montreux Convention Regarding the Regime of the Black Sea Straits* (20th July, 1936), *SURVEY OF INT'L AFFAIRS* 1936, at 584 (1936); Kirkpatrick, *The Montreux Straits Convention*, 7 *GENEVA SPECIAL STUDIES* (No. 6) (Sept., 1936); Note, *The Straits Convention of Montreux*, 1936, 18 *BRIT. Y. B. INT'L L.* 186 (1937).

war, provided such vessel has not been designed or adapted primarily for the purpose of carrying and operating aircraft at sea, shall not cause any vessel so fitted to be classified in the category of aircraft carriers (emphasis added).

According to *Jane's Fighting Ships 1975-76*, helicopter carriers and helicopter-carrying cruisers, including the *Kiev* by name, are classified as aircraft carriers.⁹ *Jane's* classifies antisubmarine cruisers, the Soviet designation of the *Kiev*, as major surface ships, *not* aircraft carriers. The editors' comment on the Soviet designation is instructive:

This is an interesting designation for a ship of this size, suggesting a bias towards [antisubmarine warfare] in her future employment but more probably aimed at circumventing the restrictions on aircraft carriers in the Montreux Convention regulating the use of the Turkish Straits.¹⁰

In analyzing the significance of the *Kiev* to naval strategy, the editors of *Jane's* note further that her construction reflected the views of Admiral Gorshkov, who urged seabased tactical air units as a necessity for navies employed in extending political influence abroad.

Perhaps the most telling argument in favor of her classification as a carrier lies in the *Kiev's* armament. A single ASW twin missile launcher and limited conventional launchers are the only nonaircraft ASW weapons on the 40,000 ton vessel. It would hardly be necessary to construct a vessel of the size and configuration of the *Kiev* to carry this limited amount of ASW weaponry. Only by adding fixed or rotary wing aircraft could the *Kiev* become an effective ASW platform. The Soviet helicopter carriers *Moskva* and *Leningrad*, which were already deployed, did add rotary wing aircraft to establish themselves as effective ASW vessels. The addition of helicopters, with attendant landing and takeoff platforms, was called for to convert the *Kiev* into a usable and cost-beneficial ASW vessel. The addition of a large, angled flight deck and 25-30 VTOL fighter aircraft designed to provide air cover make it clear that the vessel was designed *primarily* for carrying and operating both the helicopters and the VTOL aircraft and not as a platform for ASW missiles.¹¹ Without her airborne complement, a significant portion of which could not be accommodated without the large flight deck, the vessel has little fire power and no effective ASW purpose. Thus, the definition of aircraft carriers in the Convention—"designed . . . primarily for the purpose of carrying and operating at sea"—appears to be satisfied by the design and probable mission of the *Kiev*.

The foregoing analysis points to the conclusion that the *Kiev* is an aircraft carrier and that the Montreux Convention prohibits transit of the Turkish

⁹ JANE'S FIGHTING SHIPS, *supra* note 3, at 105.

¹⁰ *Id.*, at 551.

¹¹ On the role and possible missions of the *Kiev* generally, see Hynes, *The Role of the Kiev in Soviet Naval Operations*, 29 NAVAL WAR COLLEGE REV. (No. 2) 38 (Fall, 1976).

Straits by aircraft carriers.¹² Even if this analysis be accepted, however, political realities probably dictate that little if anything can be done as a matter of law about this or future transits. As noted in a treatise on the Straits:

Subsequent innovations and technological changes in naval construction and armaments have to some extent rendered obsolete the above classification of warships and have placed before the Turkish government the necessity of making delicate decisions in doubtful cases.¹³

The Soviet Union is presently constructing in the Black Sea a sister ship to the *Kiev* and thus will, within a year or two, again request Turkey for permission for an aircraft carrier to transit the Straits. Because of its position bordering on the Soviet Union and sitting astride the critical Straits, Turkey is unlikely, despite its NATO membership, to react favorably to NATO insistence on rejection of the Soviet request. Certainly recent United States-Turkish relations have had an impact on the ability of the United States to argue against the passage of the *Kiev*, and this probably means that no effective action can be taken against such future deployments by the Soviet Union.

International legal scholars should, however, take this opportunity to reexamine the Montreux Convention and to consider what options exist, including retention of the existing arrangement, for ensuring future stability in the Turkish Straits. A good starting point for consideration of such issues is Chapter 7, "The Turkish Straits: Issues and Options," of Ferenc A. Váli's book *The Turkish Straits and NATO*. In that chapter the author outlines possible policies relating to revision of the Montreux Convention, defense of the Straits, American interests in the Straits, and containment in the Middle East. If it achieved nothing else, the transit of the *Kiev* should bring a new awareness to international lawyers of the past success of the Montreux Convention and of how fragile significant changes in both technology and the balance of power have made it.

H. GARY KNIGHT

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¹² An authoritative Soviet article disputes this conclusion, resting its case solely on the statement that

[a]s a thorough analysis of the Montreux Convention shows, one can consider from a legal point of view that passage through the straits by any ships of states on the Black Sea does not contradict the letter and spirit of the convention.

Serkov, *Legal Regulations for the Black Sea Straits*, *MORSKOI SBORNIK*, No. 7 (July, 1976).

¹³ F. VÁLI, *supra* note 8, at 44.

CORRESPONDENCE

TO THE EDITOR-IN-CHIEF

18 August 1976

Inasmuch as the July 1976 issue of the American Journal of International Law does not contain a comment from Mr. Charles Bevens, former State Department Assistant Legal Adviser for Treaty Affairs, on the Note by Mr. Schröder in the April 1976 issue on the treaty-making power of the Communist Party of the USSR, I think it appropriate to act as his surrogate.

In his Note, Mr. Schröder speculates that Mr. Brezhnev's signature on behalf of the USSR to the 1972 ABM Treaty and the Interim Agreement with the United States was accepted by the United States, in accordance with Article 7, paragraph 1(b) of the Vienna Convention on the Law of Treaties, as a new international practice. Mr. Schröder is mistaken as to the facts.

Like Mr. Schröder, I too was curious as to Mr. Brezhnev's authority to sign the agreements, and, accordingly, shortly after they were signed, I asked Mr. Bevens whether Mr. Brezhnev had produced appropriate full powers (as specified in Article 7, paragraph 1(a) of the Vienna Convention). Mr. Bevens informed me that Mr. Brezhnev had, in fact, produced full powers, signed by the Chairman of the Presidium of the Supreme Soviet of the USSR and countersigned by the Minister of Foreign Affairs of the USSR. At my request, Mr. Bevens was kind enough to provide me with copies of those full powers. The copies are attached. Also attached is a similar copy of the full powers produced by Mr. Brezhnev for the 1973 Summit meeting referred to by Mr. Schröder.

BENJAMIN FORMAN
Assistant General Counsel
International Affairs
U.S. Department of Defense

THE PRESIDIUM OF THE SUPREME SOVIET OF THE UNION OF SOVIET SOCIALIST REPUBLICS

declares that it empowers Leonid Il'ich Brezhnev, General Secretary of the Central Committee of the Communist Party of the Soviet Union, to sign in the name of the Union of Soviet Socialist Republics the Agreements between the Union of Soviet Socialist Republics and the United States of America.

Moscow, June 12, 1973

[Stamp of the Presidium
of the Supreme Soviet]

Chairman of the Presidium of the Supreme Soviet of the USSR
[Signed] N. PODGORNÝ

Countersigned by the Minister of Foreign Affairs of the USSR
[Signed] A. GROMYKO

THE PRESIDUM OF THE SUPREME SOVIET
OF THE UNION OF SOVIET SOCIALIST REPUBLICS

declares that it authorizes Leonid Ilyich Brezhnev, General Secretary of the Central Committee of the Communist Party of the Soviet Union, to sign the Interim Agreement between the Union of Soviet Socialist Republics and the United States of America on Certain Measures with Respect to the Limitation of Strategic Offensive Arms.

Moscow, May 26, 1972

[Stamp of the Presidium of the Supreme Soviet
of the USSR]

Chairman of the Presidium of the Supreme Soviet of the USSR
[Signed] N. PODGORNYY

Countersigned by the Minister of Foreign Affairs of the USSR
[Signed] A. GROMYKO

THE PRESIDUM OF THE SUPREME SOVIET
OF THE UNION OF SOVIET SOCIALIST REPUBLICS

declares that it authorizes Leonid Ilyich Brezhnev, General Secretary of the Central Committee of the Communist Party of the Soviet Union, to sign the Treaty between the Union of Soviet Socialist Republics and the United States of America on the Limitation of Anti-Ballistic Missile Systems.

Moscow, May 26, 1972

[Stamp of the Presidium of the Supreme Soviet
of the USSR]

Chairman of the Presidium of the Supreme Soviet of the USSR
[Signed] N. PODGORNYY

Countersigned by the Minister of Foreign Affairs of the USSR
[Signed] A. GROMYKO

26 August 1976

TO THE EDITOR-IN-CHIEF

I would like to take issue with Professor Leo Gross' view¹ that the decisions of the Security Council to invite the PLO (Palestine Liberation Organization) to participate in its debates were ultra vires the powers of the Council.

The Indonesia case is a precedent of primary importance. It is, of course, distinguishable in the sense that the Netherlands had given some de facto recognition to the Indonesian Republic, while Israel refuses to recognize the Palestinians. As Dr. Gross recognized,² the decision of the Council in the Indonesia case was without prejudice to the question of the sovereignty of that Republic. The principle of the earlier case is clearly relevant:

¹ Gross, *Voting in the Security Council and the PLO*, 60 AJIL 470 (1976).

² *Id.* 477.

that the Council will invite the participation of an emerging political entity—even if it does not yet possess all the requisites of statehood—if such invitation will promote the peaceful settlement of a serious international dispute.

There is a second procedural principle which has a bearing; drawn from the practice of civilized nations. Courts of Equity require that all the parties in interest should be brought before them, in order that a matter in controversy may be finally settled.³ It is obvious that the Middle East controversy is not solvable without a representative of the interests of the Palestinian people. It was within the powers of the Council, under Chapter Six of the Charter, to allow the PLO to represent these interests, particularly following the recognition of that organization by the General Assembly.

CORNELIUS F. MURPHY, JR.
Duquesne University School of Law

³ See *Shields v. Barrow*, 17 How. 130 (1854).

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

Eleanor C. McDowell

Office of the Legal Adviser, Department of State

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

ALIENS

Employment (U.S. Digest, Ch. 3, §3)

President Ford issued Executive Order 11935 on September 2, 1976, barring the employment of aliens in the Federal competitive service except as determined to be in the national interest or necessary to promote efficiency in specific cases or circumstances. Civil Service Rule VII¹ was amended by adding the following new section:

SECTION 7.4 *Citizenship.*

(a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States.

(b) No person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States.

(c) The Commission may, as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments.

In identical letters to the Speaker of the House of Representatives and the President of the Senate, the President explained the action as follows:

Pursuant to the authority vested in him by the Constitution and Section 3301 of Title 5 and Section 301 of Title 3 of the United States Code, the President authorized the United States Civil Service Commission to establish standards with respect to citizenship for employment in the competitive service (Executive Order No. 10577, as amended, 5 CFR Part 2). Thereafter, the Commission prohibited generally the appointment of aliens to positions in the competitive service (5 CFR 338.101).

The Supreme Court of the United States has recently held that the Civil Service Commission's general prohibition against the employment of aliens is violative of the due process clause of the Fifth Amendment to the Constitution (*Hampton v. Mow Sun Wong*, No. 73-1596, June 1, 1976).

In its decision, the Court stated that either the Congress or the President might issue a broad prohibition against the employment of aliens in the civil service, but held that neither the Congress nor

¹ 5 C.F.R. Part 7.

the President had mandated the general prohibition contained in the regulations of the Commission.

I have concluded that it is in the national interest to preserve the longstanding policy of generally prohibiting the employment of aliens from positions in the competitive service, except where the efficiency of the service or the national interest dictate otherwise in specific cases or circumstances. It is also my judgment that it would be detrimental to the efficiency of the civil service, as well as contrary to the national interest, precipitously to employ aliens in the competitive service without an appropriate determination that it is in the national interest to do so. Therefore, I am issuing an Executive order which generally prohibits the employment of aliens in the competitive service.

The rights of citizens and aliens are affected by existing statutes which often discriminate between citizens and categories of aliens with respect to various rights, duties, and benefits. Those statutes pertaining to the Federal employment of aliens further discriminate as to specific jobs, agencies, or the nationality of aliens. I am also aware that many members of the Congress have recently sponsored legislation which would categorically prohibit the Federal employment of aliens, a broader prohibition than the various existing statutory restrictions of the limitations which I have mandated.

In this regard, I am mindful that the Congress has the primary responsibility with respect to the admission of aliens into, and the regulation of the conduct of aliens within, the United States.

While I am exercising the constitutional and statutory authority vested in me as President, a recognition of the specific constitutional authority vested in the Congress prompts me to urge that the Congress promptly address these issues.²

DIPLOMATIC MISSIONS AND EMBASSY PROPERTY

Protection of Diplomats (U.S. Digest, Ch. 4, §1)

The Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons was signed into law on October 8, 1976.¹ The purpose of the Act is to amend title 18, United States Code, to implement two international conventions: the 1971 Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance (the OAS Convention)² and the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (the UN Convention).³ The Senate gave its advice and consent to ratification of the OAS Convention on June 12, 1972, and to the UN Convention on October 28, 1975. The President signed in-

² 41 Fed. Reg. 37301-04 (1976). See also H.R. Doc. No. 94-600, 94th Cong., 2d Sess. (1976).

¹ P.L. 94-467; 90 Stat. 1997. See also H. R. REP. No. 94-1614 and S. REP. No. 94-1273, 94th Cong., 2d Sess. (1976).

² 10 ILM 255 (1971).

³ 67 AJIL 383 (1974); 13 ILM 41 (1974).

struments of ratification of the two conventions on October 8, after signing the Act.

Parties to the two conventions are required either to extradite or to prosecute offenders against internationally protected persons whether or not the crimes occur within the territorial jurisdiction of a party. Each convention provides for the punishment of murder and kidnapping of, as well as assault upon, internationally protected persons. Additionally, the UN Convention condemns attacks upon the premises or means of transportation of such persons, and condemns threats and attempts as well. The OAS Convention also condemns extortion in connection with murder, kidnapping, and assault.

Section 2 of the Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons revises section 1116 of title 18, United States Code, to conform with the two conventions. Killing and attempted killing of foreign officials, official guests, and internationally protected persons is prohibited. The penal provisions in existing law are utilized except that the penalty for first degree murder is made imprisonment for life and the penalty for attempted murder is made imprisonment for not more than twenty years.

The definitions largely parallel those previously found in 18 U.S.C. §1116 but add the term "internationally protected person" and its appropriate use throughout the remaining definitions to define that class of persons in whose favor the statute operates. "Internationally protected person" is defined as:

(A) a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or

(B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.

The term "international organization" is limited to a public international organization designated pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. §288).

Subsection (c) of section 1116 provides that in case of murder or attempted murder of an internationally protected person, the United States may exercise jurisdiction if the alleged offender is present within the United States, regardless of the place where the offense was committed or the nationality of the victim or of the alleged offender. Jay C. Waldman, Deputy Assistant Attorney General, Department of Justice, testified on June 30, 1976, in hearings before the House Subcommittee on the Judiciary that this section is the crux of the statute. He added:

The assertion of extraterritorial jurisdiction is in proper discharge of the duly adopted international obligations of the United States

pursuant to the treaty power and is further supportable under the Constitution as an exercise of the power "[t]o define and punish . . . offenses against the law of nations." There is nothing in the bills which would, in the alternative, prevent the orderly extradition of offenders when there is a legal basis for extradition. The Department believes that extradition will continue to be the normal procedure when the only nexus for jurisdiction is presence within the United States.

Section 4 of the Act includes the class of internationally protected persons within the kidnapping provisions of 18 U.S.C. §1201 and provides for the extension of jurisdiction over extraterritorial kidnappings and attempted kidnappings, as required by the convention. A new subsection (d) makes attempted kidnapping a crime.

Pursuant to the conventions, section 5 of the Act amends 18 U.S.C. §112 to include internationally protected persons within the reach of the assault provision of that section and provides for appropriate extraterritorial jurisdiction. It covers intimidating, coercing, threatening, or harassing a foreign official or an official guest, or obstructing a foreign official in the performance of his duties, or attempts to do such things. It prohibits congregating with two or more persons within one hundred feet of protected premises with intent to violate any other provision of the section.

Section 7 of the Act prohibits forcible thrusting by any person of any part of himself or any object into or upon the premises occupied by foreign officials or official guests, if done willfully with intent to intimidate, coerce, threaten, or harass. It also prohibits refusal to vacate such premises if a lawful demand is made upon the intruder.

Threats to kill, kidnap, or assault foreign officials, official guests, or internationally protected persons are prohibited under section 8 of the Act, as is extortion related to such threats. Provision is made for the requisite extraterritorial jurisdiction if the threat is directed against an internationally protected person.

Throughout the Act, provision is made for the Attorney General to request assistance from any federal, state, or local agency, including the Army, Navy, and Air Force, in enforcing the provisions against murder, kidnapping, or assault. Section 10 of the Act makes clear that the Act is not intended to preempt state law and that local officials have the right and obligation to arrest for federal as well as local crimes.

FISHERIES

"Governing International Fishery Agreements" (U.S. Digest, Ch. 7, §4)

Title II of the Fishery Conservation and Management Act of 1976,¹ approved April 13, 1976, requires that any nation wishing to fish within 200 miles of U.S. coasts must sign a "governing international fishery agreement," acknowledging U.S. jurisdiction in the 200-mile fisheries zone es-

¹ P.L. 94-265; 90 Stat. 337; 16 U.S.C. §§1821-25; 70 AJIL 624 (1976); 15 ILM 634 (1976).

established by the Act. It can then apply for permits for its fishing vessels to enter specified fisheries where surpluses have been determined to exist by Regional Fishery Management Councils.

Following signature of the Act, the United States undertook negotiations with a number of interested countries. The first such agreement to be negotiated was between the United States and Poland and was signed on August 2, 1976. In accordance with the requirements of the Act, it was transmitted by the President to the Congress, to lie for 60 days, subject to the possibility of a joint resolution to prohibit its entry into force.² President Ford recommended that, in the event 60 calendar days of continuous session as required by the Act were not available before March 1, 1977, the Congress consider issuance of a joint resolution in order to bring the agreement into force by that date. The second agreement in the series was signed with the Republic of China on September 15, 1976, and the third was signed with the German Democratic Republic on October 5, 1976.

The agreements set forth principles and procedures under which fishing may be conducted by nationals and vessels of the foreign country for the living resources over which the United States exercises fishery management authority as provided by the Act. They also describe the objectives, taking into account traditional fishing, if any, that the United States will seek in determining the portion of the surplus that may be made available to vessels of the other country. Procedures are established with respect to observers, enforcement officials, and arrests for violations. Cooperative measures in the conduct of scientific research, the exchange of information, and periodic consultation are provided. Provision is also made, on a prospective basis, for U.S. fishing in the fishery conservation zone of the other country, should the United States indicate its interest. Annexes govern permit procedures and collection and reporting requirements.

THE DEEP SEABED AND THE HIGH SEAS

Permanent Regime (U.S. Digest, Ch. 7, §5)

The United States put forward significant new proposals on the deep seabeds at the resumed session of the Third UN Conference on the Law of the Sea, which met in New York August 26–September 17, 1976. It indicated its readiness to agree to a financing arrangement for the proposed Enterprise (the independent operating arm of the International Seabed Authority) designed to enable the Enterprise to begin mining operations within a reasonable timespan. The United States further proposed that there could be a review, possibly in 25 years, to determine if the provisions of the treaty regarding the system of seabed exploitation were working adequately. Secretary of State Kissinger described the U.S. initiatives in a statement to heads of delegations at the Conference on

² H.R. Doc. 94-613, 94th Cong., 2d Sess. (1976).

September 1, 1976, as follows:

At the last session, the United States proposed the system of parallel access in which, concurrently with any state or private mining of the deep seabeds, a similar site would have to be set aside for the international community to be exploited or mined by the international community. . . .

On reflection, many countries have expressed reservations about this concept on many grounds . . . one of the principal grounds was that it did no good to set aside a part of the mining sites for the international community if the international community did not possess the financial resources with which to mine or to put its Enterprise into business and if there were no provisions for the transfer of technology to the international community.

We have taken these views into serious consideration. And, therefore, on the occasion of my meeting with some of the members of Committee I, I proposed on behalf of the U.S. Government that the United States would be prepared to agree to a means of financing the Enterprise in such a manner that the Enterprise could begin its mining operation either concurrently with the mining of state or private enterprises or within an agreed timespan that was practically concurrent.

We proposed also that this would include agreed provisions for the transfer of technology so that the existing advantage of certain industrial states would be equalized over a period of time.

We have also taken into account the views that have been expressed by some delegates that it might be premature to establish a permanent regime for the deep seabeds, for the exploitation of the deep seabeds, at the beginning of a process of technology and to freeze it for an indefinite period of time.

For this reason we have proposed today that there could be periodic review conferences at intervals to be negotiated—for example, 25 years—in which the methods by which mining in the deep seabeds takes place and the apportionment between various sectors could be periodically reexamined.

The United States has made its proposals, which represent significant restrictions on our freedom of action, for the sake of international peace and international harmony and for the purpose of demonstrating that in this new area of mankind's activities we will make every effort to avoid the sort of rivalries that characterized colonial exploitations of the 19th century.

But there are limits beyond which no American leader can go. And if those limits are attempted to be exceeded, then we will find ourselves in the regrettable and tragic situation where at sea—just as previously on land—unilateralism will reign supreme.

We in the United States would not, in the short term, have any disadvantages from this—quite the contrary. But we are part of mankind, and we believe that an opportunity would be lost that may not come again.

¹ 75 DEPT. STATE BULL. 397-99 (1976).

CLAIMS SETTLEMENT AGREEMENTS

U.S.-Peru (U.S. Digest, Ch. 9, §3)

The Department of State announced on September 23, 1976, that the United States had reached a satisfactory agreement with the Government of Peru on compensation for the assets of the Marcona Mining Company that were nationalized by the Government of Peru in July 1975.¹ The Department's announcement described the agreement in general terms as follows:

The settlement consists of a cash payment to Marcona and a contract for sales of Peruvian iron ore in the United States that will increase Peru's foreign exchange earnings and provide Marcona with additional compensation. The aggregate value of this settlement constitutes just compensation within the meaning of the laws of both the United States and Peru.

... In substance, the compensation consists of \$37 million in cash and an ore sales contract at prices the Government of Peru estimates will provide Marcona an additional compensation of \$22.44 million, but which, depending on market conditions, may ultimately produce more or less compensation than the valuation amount. Finally, Marcona will receive approximately \$2 million in compensation from a previously concluded shipping contract. This agreement will have a broad and positive impact. It removes an obstacle to the constructive relations to which both governments are committed. Because it demonstrates that fair and equitable treatment for foreign capital can be assured within the Peruvian revolutionary process, the settlement constitutes a point of departure for increased private as well as public cooperation and practical progress on a wide variety of fronts.²

NEUTRALITY AND NONBELLIGERENCY

Mercenaries (U.S. Digest, Ch. 14, §4)

Daniel Gearhart, an American convicted of being a mercenary by a tribunal in Angola, was executed on July 10, 1976, after President Agostinho Neto of Angola refused to commute the death sentence, despite numerous pleas for clemency made by the United States, other governments, international organizations, and individuals. At a press conference in the Department of State that day, Secretary of State Kissinger stated:

... [T]here is absolutely no basis in national or international law for the action now taken by the Angolan authorities. The "law" under which Mr. Gearhart was executed was nothing more than an internal ordinance of the MPLA [Popular Movement for the Liberation of Angola] issued in 1966, when the MPLA was only one of many guerrilla groups operating in Angola. Furthermore, no evidence whatsoever was produced during the trial of Mr. Gearhart in Luanda that he had even fired a shot during the few days he was in Angola before his capture.

¹ 15 ILM 1100 (1976).

² Dept. of State Announcement, Sept. 23, 1976. The agreement entered into force October 21, 1976.

The decision by President Neto to ignore both the law and the facts can only be regarded by the United States as a deliberately hostile act toward this country and its people. As such, it cannot help but affect adversely the development of relations between the United States and Angola.¹

In testimony on August 9, 1976, before the House International Relations Committee Special Subcommittee on Investigations, Assistant Secretary of State William E. Schaufele, Jr., said:

... The recruitment of mercenaries within the territory of the United States to serve in the armed forces of a foreign country is an offense under our Neutrality Laws. ...

... [N]o Americans were recruited directly or indirectly by the U.S. Government to fight in Angola. Those men were there on their own, without our advance knowledge or approval. We attempted to discourage Americans from going to Angola as mercenaries. Anyone who called us was given that message clearly and distinctly. ...

... [A] legally accepted definition of what constitutes a mercenary does not exist in international law. Nor is the act of serving as a mercenary a crime in international law, not to mention Angolan law where the Angolan authorities were forced to use a set of guidelines for their combatants the MPLA issued in 1966. The general international practice appears to consider mercenaries in the same status as other combatants and therefore to be treated as such under the terms of the Geneva Convention of 1949. This has certainly been American practice back to the Revolutionary War and was reflected in our treatment of captured Hessian troops. This was also the case in the Civil War when there were combatants on both sides who fought for hire, adventure, or beliefs and who could be considered by some as mercenaries.

We had been skeptical about the quality of the justice administered, and were appalled by the severity of the sentence given to Mr. Gearhart. ... the act of being a mercenary is not a crime in international law and mercenaries were entitled to the same status and protection as other combatants under the 1949 Geneva Conventions and the rules of warfare. Mr. Gearhart was not charged with any other specific crime. No evidence was presented that he had harmed anyone during the few days he was in Angola before his capture.

In carrying out the responsibility to assist United States citizens and nationals charged with crimes in foreign countries, we attempted as best we could to obtain a reconsideration of the death penalty for Mr. Gearhart. For reasons which are not clear to us, but appear to be largely political, Dr. Neto refused to listen to us or to any other of the appeals made to him. ...

The Angolan authorities charged the defendants with being mercenaries and with being the agents of foreign interests and governments. The United States Government and the CIA [Central Intelligence Agency] were often mentioned but I wish to emphasize that no evidence of any sort, apart from undocumented and vague charges, was ever presented; that is, unless you consider that the claim that

¹ 75 DEPT. STATE BULL. 163 (1976).

the mercenaries were paid in "crisp \$100 bills"—a charge apparently made much of—constitutes proof of involvement by the United States Government.²

Robert L. Keuch, Deputy Assistant Attorney General, Criminal Division, Department of Justice, in a statement before the same Subcommittee on August 9, described U.S. law relative to enlistment or recruiting as follows:

The principal statute covering the matter of enlistment or recruiting within the United States is contained in Title 18, Chapter 45 (Foreign Relations), of the United States Code. Specifically, 18 U.S.C. §959(a) provides, in pertinent part, that:

Whoever, within the United States, . . . hires or retains another to enlist . . . in the service of any foreign . . . state, . . . as a soldier . . . shall be fined not more than \$1,000 or imprisoned not more than three years, or both.

Thus, Section 959 prohibits the enlistment or recruitment *within the United States* of any person for service in the armed forces of a foreign country. *Gagon v. McCarthy*, 252 U.S. 171 (1920). In addition, Section 958 prohibits a United States citizen from accepting and exercising a commission in a foreign service in a war against a foreign nation with which the United States is at peace. Section 960 prohibits the launching of a military or naval expedition from the United States against any nation with which the United States is at peace. With regard to the application of these statutes, it should be emphasized that, in general, it is not unlawful for a citizen or other person in the United States to leave the country with the intent to enlist abroad in a foreign military service. See *Wiborg v. United States*, 163 U.S. 632 (1896).

In addition to the statutes, . . . 8 U.S.C. 1481(a)(3) provides that any citizen of the United States who enters the armed forces of a foreign state, without the written authorization of the Secretaries of State and Defense, shall lose his citizenship. This provision, however, must be read in the light of the Supreme Court's decision in *Afroyim v. Rusk*, 387 U.S. 253 (1967), which held that an act of Congress could not divest a person of his United States citizenship absent voluntary abandonment thereof by the citizen himself. Thus, a declaration of intent clearer than mere enlistment in a foreign army is required for an effective renunciation of citizenship, notwithstanding the provisions of 8 U.S.C. 1481(a)(3). Therefore, despite assertions to the contrary, service as a mercenary does not cause the loss of United States citizenship.

In connection with the activities of any foreign agent who may be involved in enlistment or recruitment within the United States, the provisions of the Foreign Agents Registration Act (22 U.S.C. 611, *et seq.*) would apply. For example, a registered agent who willfully fails to report an activity such as recruiting would be liable to criminal penalties. 22 U.S.C. 618(a)(2). Any individual who within the United States dispenses any money for or in the interest of a foreign principal also comes within the Act. 22 U.S.C. 611(c)(iii).³

² *Id.*, 341-42.

³ Text released by Dept. of Justice, Aug. 9, 1976.

UNITED NATIONS AND REGIONAL PEACEKEEPING

UN Command in Korea (U.S. Digest, Ch. 14, §5)

On August 18, 1976, North Korean military personnel attacked UN Command (UNC) personnel in the Joint Security Area of the Korean Demilitarized Zone, killing two American officers and injuring four Americans and five Republic of Korea military personnel. The UNC personnel were trimming branches from a tree which the UNC considered to hinder observation between two UNC checkpoints. The UN Commander promptly requested a meeting of the Military Armistice Commission (MAC), and UN forces in Korea were put on an increased state of alert. U.S. air units and a carrier task group were sent to the area. On August 21, the UNC sent 110 Americans and South Korean personnel into the Demilitarized Zone (DMZ) to cut down the disputed tree and remove two North Korean roadblocks. A few hours later North Korean President Kim Il-sung conveyed a message through the MAC to the Commander in Chief of the UNC, expressing regret that the August 18 incident had occurred and urging that further incidents in the area be avoided.

No report to Congress under the terms of the War Powers Resolution¹ was made in connection with the events in Korea and the augmentation of U.S. forces there. George H. Aldrich, Acting Legal Adviser of the Department of State, in a memorandum of August 21, 1976, stated the relevant considerations concerning that decision as follows:

The War Powers Resolution requires that "the President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances . . .". Given what I know of the situation in Korea, I would not interpret this requirement as applicable to the strengthening of our armed forces there, even when accompanied by a heightened alert status. More difficult is the question whether the sending of reinforced patrols into the DMZ would qualify, but, so long as they are engaging merely in acts which we are entitled to take under the Armistice Agreement and which we have consistently taken, then I do not think the prospect of increased North Korean aggressiveness triggers the consultation requirement. In any event, consultation is only required where "possible"; and, to the extent that it is possible, it is clearly desirable in any case.

The resolution requires reporting within 48 hours in three circumstances. The possibly relevant one with respect to the presently planned deployment is Sec. 4(a)(3)—"numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation." Whether the proposed additions are substantial enlargements depends upon an analysis of what is already there and what is being added.

I believe it would be an undesirable precedent to construe the resolution as requiring a report in a situation where a relative handful of people have been added to an existing force of some 41,000 men. Although in terms of tactical aircraft the increment is significant, I

¹ P.L. 93-148; 87 Stat. 555; 68 AJIL 372 (1974).

believe we should interpret 4(a)(3) as concerned primarily, if not entirely, with numbers of military personnel, rather than with items of equipment. Certainly the text speaks of "numbers," and the examples given in the legislative debates referred only to numbers of personnel. I am satisfied that this interpretation is reasonable and fully defensible and that a contrary interpretation would create a precedent that would haunt us in many future cases.²

On September 6, 1976, a supplementary agreement to the Military Armistice Commission Headquarters Agreement of October 19, 1953, was signed in the MAC by the Secretary of the UNC Delegation and the Secretary of the Delegation of the Korean People's Army and the Chinese People's Volunteers (KPA/CPV). It restricts security personnel to their respective sides of the military demarcation line within the Area and provides for removing the North Korean guard posts from the UNC side. The provision against movement across the military dividing line does not apply to MAC personnel, joint observer teams, or the personnel of the Neutral Nations Supervisory Commission.

The United States, on behalf of the UNC, transmitted a report of the Korean incident to the President of the Security Council.³

² Dept. of State File No. P76 0149-2476. *See also* statement of September 1, 1976 by Ambassador Arthur W. Hummel, Jr., Assistant Secretary of State for East Asian and Pacific Affairs before the Subcommittee on International Organizations and International Political and Military Affairs of the House Committee on International Relations. 75 DEPT. STATE BULL. 386-92 (1976).

³ UN Doc. S/12181, Aug. 20, 1976.

JUDICIAL DECISIONS

ALONA E. EVANS

Boundary—lateral seaward—New Hampshire—Maine

STATE OF NEW HAMPSHIRE V. STATE OF MAINE. 96 S.Ct. 2113.
U.S. Supreme Court. June 14, 1976.

New Hampshire brought an original action against Maine to clarify the location of their seaward boundary between Portsmouth Harbor and the entrance to Gosport Harbor in the Isles of Shoals. The boundary had been determined by King George II in 1740; however, there was continuing disagreement between the states over the location of the "Mouth of the Piscataqua River," "Middle of the River," and "Middle of the Harbour." A Special Master was appointed to examine the controversy. Both states filed exceptions to his report, but before there were further proceedings, the states agreed on the meanings of these terms and moved for a consent decree, settling the dispute accordingly. The Special Master submitted the whole record to the Supreme Court; he expressed doubt, however, in the light of *Vermont v. New York* (417 U.S. 270 (1974)) that the consent decree constituted a "case" or "controversy" resulting in a settlement which the Court could enforce under Article III of the Constitution. The Supreme Court found that it could give effect to the consent decree under Article III.

Distinguishing *Vermont v. New York*, Mr. Justice Brennan observed, *inter alia*, that the consent decree in that case would have assigned the Supreme Court to the role of arbitrator, whereas in the instant case the consent decree was designed to decide the boundary question by defining the disputed language of the 1740 decree. The Court pointed out that "[t]he consent decree therefore proposes a wholly permissible final resolution of the controversy both as to facts and law,"¹ so that it was not necessary for the Court to adjudicate the issues. Brennan, J., found no merit in New Hampshire's contention that the consent decree could be construed as an interstate compact within the terms of Article I, §10(3) of the Constitution which would require congressional consent. The Court observed that the consent decree merely clarified the 1740 decree and in no way enlarged upon the political powers of either state to the detriment of the Federal Government.

Mr. Justice White with Blackmun and Stevens, JJ., dissenting, contended that the Court should have construed the legal meanings of the terms at issue.

¹ 96 S.Ct. 2113, 2117 (footnotes by Court omitted).



Boundary—river and lateral seaward—1958 Geneva Convention on the Territorial Sea and Contiguous Zone—Texas—Louisiana

STATE OF TEXAS V. STATE OF LOUISIANA. 96 S.Ct. 2155.
U.S. Supreme Court, June 14, 1976.

In a boundary dispute between Texas and Louisiana, the Supreme Court held that the boundary should be a line running through the geographical middle of the Sabine Pass, Sabine Lake, and Sabine River. The Court awarded possession to Louisiana of all islands in the eastern half of the River which it had owned in 1812 when it was admitted into the Union and any which had formed thereafter. Questions about the boundary and ownership of islands in the western half of the River were to be resolved after a Special Master's report had been prepared. (*State of Texas v. State of Louisiana*, 410 U.S. 702 (1973); 67 AJIL 784 (1973)). Louisiana then moved to enlarge the scope of the Special Master's inquiry to include consideration of its lateral seaward boundary with Texas. (414 U.S. 904 (1973)). The United States entered the controversy by claiming title to six islands, later reduced to a claim of one, in the western half of the Sabine River. (414 U.S. 1107 (1973); 416 U.S. 903 (1974)). The Special Master ruled against the United States claim. In the rest of the report, he found partly for Louisiana and partly for Texas. Both states took exception to his recommendations. The Supreme Court in a per curiam opinion overruled these exceptions.

Louisiana complained that the Special Master had utilized the thalweg rule in determining the boundary, contrary to the Court's decision in *State of Texas v. State of Louisiana* (410 U.S. 702, 709). The Court found, however, that the Special Master, following the Court's previous ruling, had made his determination on the theory of the geographical middle.

Texas argued that the Special Master's recommendations disregarded Texas' claim to an "historic 'inchoate' boundary"¹ in the Gulf of Mexico. The Court upheld his view that there was no "established offshore boundary between the States."² Although it was generally agreed that the seaward boundary should be determined on the equidistant principle as stated in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone,³ Texas contended that the Court should apply this principle, as Congress would have done, to the disputed coastline as it had existed in 1845 when Texas was admitted into the Union rather than the coastline as it had been subsequently modified by the construction of jetties at the mouth of the Sabine River. The Supreme Court said:

The short answer to Texas' argument is that no line was drawn by Congress and that the boundary is being described in this litigation for the first time. The Court should not be called upon to speculate as to what Congress might have done. We hold the Special Master correctly applied the Convention on the Territorial Sea and Contiguous Zone to this suit. As we previously have recognized, "the

¹ 96 S.Ct. 2155, 2157 (footnotes by Court omitted).

² *Ibid* (emphasis by Court).

³ 15 UST 1606; TIAS No. 5639; 516 UNTS 205; 52 AJIL 851 (1958).

comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which, absent the Convention, would be most troublesome." *United States v. California*, 381 U.S. 139, 165 (1965). When read together, Arts. 12 and 8 of the Convention clearly require that the median line be measured with reference to the jetties.⁴

Aliens—adjustment of status to permanent resident—criminal record—effect of foreign amnesty decree

MARINO V. IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, 537 F.2d 686.

U.S. Court of Appeals, 2d Circuit, June 24, 1976.

Petitioner, an Italian national who had entered the United States on a visitor's visa, was denied adjustment of status to that of alien lawfully admitted into the United States for permanent residence (8 U.S.C. §1255) on the ground that he had been convicted in Italy of a crime involving moral turpitude (8 U.S.C. §1182(a)(9)). He was ordered to be deported for overstaying his visa (8 U.S.C. §1251(a)(2)). It was shown that petitioner had been convicted on a charge of fraudulent destruction of his own property. He had appealed this decision; however, the appeal had not been heard on the ground that his conviction had been wiped out by a presidential amnesty decree. The immigration judge denied petitioner's application for adjustment of status. The Board of Immigration Appeals dismissed his appeal. He petitioned for review of this order. The Court of Appeals vacated the order and remanded the case for consideration of petitioner's application for adjustment of status.

Bryan, D. J., pointed out that as a general rule of interpretation of the immigration laws, the disability created by a foreign conviction could not be relieved by a foreign amnesty decree or pardon. Here, however, petitioner could not be considered to have been "convicted" until his legal remedies had been exhausted or waived. The Court concluded that as petitioner had not sought nor accepted amnesty, the grant of amnesty could not be construed as constituting a waiver of his right to appeal from his conviction. It followed that petitioner was eligible for relief under §1255.

Aliens—permanent residents—parolees—eligibility for medical insurance for aged—five year residency requirement

MATHEWS V. DIAZ, 96 S.Ct. 1883.

U.S. Supreme Court, June 1, 1976.

In a class action, plaintiff challenged the constitutionality of a provision in the Medicare Part B medical insurance program for persons over 65 years of age which extended benefits to aliens who had been admitted to permanent residence in the United States and who had resided in the country for at least five years. (42 U.S.C. §1395o(2)). The District Court allowed the complaint to be amended so that two other plaintiffs could participate. All three plaintiffs were Cuban refugees,

⁴ 96 S.Ct. 2155, 2158.

over 65 years of age; two were in the United States on parole (8 U.S.C. §1182(d)(5)); the third had been admitted to permanent residence; and none had met the residency requirement. The Government moved to dismiss the complaint on the ground that plaintiffs had not exhausted their administrative remedies. Plaintiffs moved for summary judgment. The District Court found for plaintiff who had permanent residence, holding that the five year residency requirement discriminated against resident aliens in violation of the Due Process Clause of the Fifth Amendment and that, as this requirement was an integral part of the eligibility provision of §1395o(2), the section could no longer be enforced. (361 F.Supp. 1 (S.D.Fla. 1973)). The Government appealed to the Supreme Court (28 U.S.C. §1252). The Court reversed the decision of the District Court.

With regard to the jurisdiction of the District Court, Mr. Justice Stevens found that it had been established by the government's stipulation in the District Court that plaintiffs' applications for medical insurance benefits would have been denied had they endeavored to exhaust available administrative remedies. The Court then pointed out that, although all aliens are protected against deprivation of life, liberty, or property without due process of law under the Fifth and Fourteenth Amendments, Congress' power to control immigration and naturalization enables it to discriminate between citizens and aliens. The question here was whether this plenary power could extend to discrimination between classes of aliens, *i.e.*, between aliens admitted as parolees and those having the status of permanent residents and to the establishment of a requirement such as the five year residency rule. In the opinion of the Court, Congress had this power. Stevens, J., said:

We may assume that the five-year line drawn by Congress is longer than necessary to protect the fiscal integrity of the program. We may also assume that unnecessary hardship is incurred by persons just short of qualifying. But it remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences, and, of greatest importance, that those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity to the United States than those who do not. In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not.

The task of classifying persons for medical benefits, like the task of drawing lines for federal tax purposes, inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line; the differences between the eligible and the ineligible are differences in degree rather than differences in the character of their respective claims. When this kind of policy choice must be made, we are especially reluctant to question the exercise of congressional judgment. In this case, since appellees have not identified a principled basis for prescribing a different standard than the one selected by Congress, they have, in effect, merely invited us to substitute our judgment for that of Congress in deciding which aliens shall be eligible to participate in

the supplementary insurance program on the same conditions as citizens. We decline the invitation.¹

The Court distinguished *Graham v. Richardson* (403 U.S. 365 (1971)) on the following grounds:

That case holds that state statutes that deny welfare benefits to resident aliens, or to aliens not meeting a requirement of durational residence within the United States, violate the Equal Protection Clause of the Fourteenth Amendment and encroach upon the exclusive federal power over the entrance and residence of aliens. Of course, the latter ground of decision actually supports our holding today that it is the business of the political branches of the Federal Government, rather than that of either the States or the federal judiciary, to regulate the conditions of entry and residence of aliens. The equal protection analysis also involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government.

Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business. Furthermore, whereas the Constitution inhibits every State's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States.²

Aliens—permanent residents—eligibility for financial aid to education—citizenship requirement—the law of New York

MAUCLET v. NYQUIST, 406 F.Supp. 1233.

U.S. District Court, W.D. New York, Feb. 11, 1976.

Plaintiffs, nationals of France and Canada, respectively, who had been admitted to permanent residence in the United States and who were students at New York state universities, complained that they had been denied equal protection of the laws in violation of the Fourteenth Amendment by the operation of §661(3) of the New York Education Law (McKinney's Supp. 1975) which required that an applicant for financial aid to education must be either a United States citizen or a declarant alien. One plaintiff sought damages for funds withheld. Plaintiffs requested a judgment declaring that §661(3) was unconstitutional and an injunction against its enforcement and requiring the state to provide the requested financial aid. The District Court held that §661(3) was unconstitutional, but denied the request for damages, pursuant to the Eleventh Amendment.

The Court found that plaintiffs had standing to bring the suit. The state contended that they were not being discriminated against on ac-

¹ 96 S.Ct. 1883, 1893 (footnotes by Court omitted).

² *Id.* 1893-94.

count of their alienage but rather that on applying for financial aid, they were afforded an opportunity to indicate whether they intended to apply for United States citizenship; if they responded affirmatively, they were eligible for aid. Observing that "[t]his argument defies logic,"¹ Curtin, C. J., pointed out that the state was making a classification here on the basis of alienage without regard to the Supreme Court's statement in *Graham v. Richardson* that such "classifications . . . are inherently suspect and subject to close judicial scrutiny. . . ."² As the Supreme Court had pointed out in *Re Griffiths* (413 U.S. 717 (1973); 68 AJIL 334 (1974)), the burden was on the state to prove why such a classification was warranted. In the opinion of Curtin, C. J., New York had not carried the burden in this case.

Jurisdiction—aliens—confiscation of property—act of state—right to relief under certain treaties—self-executing treaty

DREYFUS v. VON FINCK, 534 F.2d 24.

U.S. Court of Appeals, 2d Circuit, April 6, 1976.

Plaintiff, a Swiss national and resident, sued certain citizens and residents of the Federal Republic of Germany to recover for the alleged wrongful confiscation of his property in Germany in 1938. Plaintiff, of Jewish belief and a national and resident of Germany in 1938, contended that he had been compelled to sell his interest in a banking firm at a loss to defendants and then to leave the country. A settlement of the claim was reached in 1948 but was not carried out by defendants. Plaintiff then brought an action in a Restitution Court which had been established by the United States Military Command in Germany pursuant to Military Law 59.¹ While a decision of this court regarding the claim was on appeal, the parties arrived at a second settlement. Plaintiff now contends that he should be able to recover for the original confiscation as well as the alleged unfulfilled 1948 settlement. The jurisdiction of the District Court was predicated upon diversity of citizenship (28 U.S.C. §1332) and the alleged violation of certain treaties to which the United States was party² (28 U.S.C. §§1331, 1350).

Defendants moved to dismiss the complaint for want of subject matter jurisdiction (Fed.R.Civ.P. 12(b)(1)). Both parties agreed in oral argument that there was no diversity jurisdiction. The District Court held that as treaties had been invoked, it could rule upon the question of whether a cause of action existed. The Court found no cause of action upon which relief could be granted (Fed.R.Civ.P. 12(b)(6)) because

¹ 406 F.Supp. 1233, 1235 (footnotes by Court omitted).

² *Ibid.* 403 U.S. 365, 372 (1971) (quoted by Court; emphasis by Court).

¹ 12 Fed. Reg. 7983 (1947) (cited by Court).

² 1907 Hague Convention Respecting the Laws and Customs of War on Land, 36 Stat. 2277, TS 539; 1919 Versailles Treaty; 1928 Treaty Providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), 46 Stat. 2343, TS 796, 94 LNTS 57; 1944 Agreement on Control Machinery in Germany, 5 UST 2062, TIAS No. 3070, 236 UNTS 359.

plaintiff had no private right to recovery under these treaties and because under the Act of State Doctrine, the Court could not inquire into the conditions of the alleged confiscation.

After reargument, plaintiff was allowed to amend his complaint, specifying his right to recovery under the terms of the treaties. Defendants moved to dismiss. After reviewing these treaties, the recent cases relating to the Act of State Doctrine, and the "*Bernstein*" exception,³ the District Court took the view that the Act of State Doctrine was applicable here; however, the Court dismissed the complaint on the basis of Fed.R. Civ. P. 12(b)(6). The Court of Appeals affirmed this decision.

In the opinion of Van Graafeiland, C.J., the District Court was correct in assuming subject matter jurisdiction over plaintiff's claims based upon treaties. The Court noted that "[w]hile these provisions [28 U.S.C. §§1331, 1350] do not create a cause of action for a plaintiff seeking recovery under a treaty, they do give the District Court power to determine whether, in a well pleaded complaint, a cause of action exists."⁴ Plaintiff's additional allegation of jurisdiction based upon Military Law 59, which the parties had stipulated could be submitted in argument before the Court of Appeals, was not well founded because Military Law 59 was an Executive Order and, hence, not a law within the meaning of §1331.

In specific regard to the treaties, the Court pointed out that an individual could claim rights under a treaty only if it so provided. The Court said:

It is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights. *Foster v. Neilson*, 2 Pet. 253, 27 U.S. 253, 7 L.Ed. 415 (1829); . . . Indeed, even where a treaty is self-executing, Federal jurisdiction under §1331 will not lie where it is not provided for in the treaty.⁵

None of the treaties relied upon by plaintiff conferred private rights regarding property upon individuals.

Invoking §1350, plaintiff argued that defendants' alleged repudiation of the 1948 settlement constituted a tort in violation of international law. Van Graafeiland, C.J., observed:

There has been little judicial interpretation of what constitutes the law of nations and no universally accepted definition of this phrase. There is a general consensus, however, that it deals primarily with the relationship among nations rather than among individuals.

Like a general treaty, the law of nations has been held not to be self-executing so as to vest a plaintiff with individual legal rights. *Pauling v. McElroy*, 164 F.Supp. [390], 393 [D.D.C. 1958].

³ *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart Maatschappij*, 210 F.2d 375 (2d Cir. 1954) (footnote by Court; other footnotes by Court omitted).

⁴ 534 F.2d 24, 28.

⁵ *Id.* 30.

More importantly for purposes of this lawsuit, violations of international law do not occur when the aggrieved parties are nationals of the acting state.⁶

It was clear from the facts that both parties were nationals and residents of Germany at the time of the alleged confiscation.

Jurisdiction—outer continental shelf—claim to abandoned ancient vessel—1958 Geneva Convention on Continental Shelf—conflict between treaty and statute

TREASURE SALVORS, INC. v. ABANDONED SAILING VESSEL. 408 F.Supp. 907. U.S. District Court, S.D. Florida, Feb. 3, 1976, amended Feb. 4, 1976.

Plaintiffs brought an action for possession and confirmation of title against all persons as to the wreck of a Spanish sailing vessel which had been sunk around 1622 on the outer continental shelf beyond United States territorial waters. The United States answered and filed a counterclaim to title on the basis of the Antiquities Act, 16 U.S.C. §§432, 433, or, in the alternative, the Abandoned Property Act, 40 U.S.C. §310. Plaintiff contended that according to maritime and international law the finder of an abandoned vessel may assert possession against all claimants except the original owner. The United States, on the other hand, asserted the common law right of the sovereign to property found in the sea by a subject and maintained that by enacting the two statutes, Congress had recognized this doctrine. Plaintiffs moved for summary judgment. The District Court found for plaintiffs.

Mehrtens, Senior D.J., observed that in the principal case which interpreted 40 U.S.C. §310, it was held that the phrase "ought to come to the United States"¹ referred to war matériel abandoned by both sides during the Civil War and that Congress must specifically assert the sovereign prerogative over abandoned property which did not fall within this category. The Court pointed out that according to 16 U.S.C. §§432, 433, the property at issue would have to be "situate on lands owned or controlled by the Government of the United States" while according to 40 U.S.C. §310, the property would have to be "within the jurisdiction of the United States."² The property at issue did not come within either statute. The wreck was located on the outer continental shelf; however, U.S. jurisdiction in this area extended only to the mineral deposits (43 U.S.C. §1332 *et seq.*). Moreover, Article 2 of the 1958 Geneva Convention on the Continental Shelf limited state jurisdiction to "exploring . . . and exploiting its [the shelf's] natural resources."³ Mehrstens, D.J., pointed out that if there were any conflict between the Convention and the statute, the former would prevail.

The Court found no merit in the government's contention that, as its jurisdiction could reach the extraterritorial activities of United States citi-

⁶ *Id.* 30-31.

¹ 408 F.Supp. 907, 909 (footnotes by Court omitted).

² *Id.* 910.

³ 15 UST 471; TIAS No. 5578; 499 UNTS 311; 52 AJIL 858 (1958).

zens, it could extend to a salvage operation on the outer continental shelf. The Court concluded that "Congress has not exercised its sovereign prerogative to the extent necessary to justify a claim to an abandoned vessel located on the outer continental shelf. Under the facts of this case, possession and title are rightfully conferred upon the finder of the *res derelictae*."⁴

Extradition—statute of limitations—"constructive flight"

JHIRAD V. FERRANDINA. 536 F.2d 478.

U.S. Court of Appeals, 2d Circuit, April 12, 1976; rehearing denied May 21, 1976.

Petitioner's extradition was requested by India on a charge of embezzlement from an account known as the Naval Prize Fund which consisted of monies transferred by the United Kingdom to the Indian Navy for payment to Indians who had served in the British Navy during the Second World War. Petitioner had administered this account between 1958 and 1961 in his position as Judge Advocate General of the Indian Navy. When one ex-sailor complained that no payment had been made to him, it was ascertained that no record had been kept of the distribution of the funds. About eight months after an inquiry had begun into the disposition of the funds, petitioner left India, ostensibly to attend a conference. He traveled in Europe and resided for a time in Israel; he then came to the United States in 1971. India requested his extradition in 1972, pursuant to the terms of the 1931 Extradition Treaty with the United Kingdom to which India had succeeded.¹

Petitioner's request for habeas corpus relief was denied by the District Court (355 F.Supp. 1155, S.D.N.Y. (1973)). This decision was reversed by the Court of Appeals, and the case was remanded for a determination of the question whether petitioner's intent in leaving India had been in fact to delay the investigation, so that the statute of limitations (18 U.S.C. §3282) could not be invoked with respect to the charges, or whether his departure from and continued absence from India constituted flight to avoid prosecution, in which case the statute of limitations would not apply (18 U.S.C. §3290; 486 F.2d 442, 2d Cir. (1973); 68 AJIL 330 (1974)). On remand, the extradition magistrate held that petitioner's departure from India was actually "constructive flight," undertaken in order to avoid prosecution. The District Court approved this decision and denied petitioner's third request for habeas corpus (401 F.Supp. 1215, S.D.N.Y. (1975)). The Court of Appeals affirmed.

Under the limited scope of review provided by a habeas corpus proceeding, petitioner argued that the requesting state had not submitted sufficient evidence to warrant a conviction for embezzlement under New York law. Lumbard, C.J., pointed out that India had amply established its charge that the funds had disappeared in the course of petitioner's

⁴ 408 F.Supp. 907, 911.

¹ 47 Stat. 2122; TS 849; 163 LNTS 59.

administration thereof. The question of "constructive flight," however, was a more complex matter. According to 18 U.S.C. §3290, "[n]o statute of limitations shall extend to any person fleeing from justice." The Court of Appeals in the earlier stage of this case had taken the position that §3290 could be invoked "only if 'an intent to flee from prosecution or arrest' is shown."² Petitioner argued that the extradition magistrate could not properly inquire into his motives for remaining away from India. Lumbard, C.J., disagreed. The Court said:

We are convinced that the notion of "constructive flight" developed by the magistrate, although concededly without precedent, is fully supported by both the language and the logic of 18 U.S.C. §3290. We cannot agree with Jhirad that a meaningful distinction exists between those who leave their native country and those who, already outside, decline to return. In *Streep v. United States*, 160 U.S. 128, 135, 16 S.Ct. 244, 247, 40 L.Ed. 365, 369 (1895), the Supreme Court rejected just such a formalistic approach. The Court there held that it was unnecessary to prove that the defendant had fled the jurisdiction of a particular court, state or federal, if it could be established that his movements were prompted by a desire to avoid and thwart the orderly workings of the judicial process. We believe that principle to be applicable here.

We note, moreover, that even were we to agree with appellant that our opinion in *Jhirad I* [486 F.2d 442; 68 AJIL 330 (1974)] neither anticipated nor justified the magistrate's determination of "constructive flight," the law of the case doctrine is only discretionary in this circuit and we are therefore free, as an appellate court, to revise our earlier ruling in the light of new evidence presented at the subsequent hearing. See *United States v. Fernandez*, 506 F.2d 1200, 1203 (2d Cir. 1974).³

The Court found that there was a sufficient evidentiary basis for the conclusion that petitioner had intended to leave India in order to avoid prosecution.

The Court rejected petitioner's demand for discovery on the ground that the extradition hearing is not a trial. Petitioner's argument that India should prove its case beyond a reasonable doubt failed because that standard of proof applied to a criminal proceeding whereas in an extradition proceeding the standard of proof is preponderance of the evidence. Petitioner's final argument that the extradition request was politically motivated was not substantiated, in the opinion of the Court.

On petition for rehearing, petitioner sought to show that the magistrate and District Court lacked jurisdiction to conduct an evidentiary hearing on the remand. Apart from the fact that petitioner should have raised this issue earlier in the proceedings, Lumbard, C.J., found no merit in the contention which, if accepted, "would . . . impose a bifurcated structure on international extradition proceedings,"⁴ thereby restricting the authority of the magistrate.

² 486 F.2d 442, 444.

³ 536 F.2d 478, 483 (footnotes by Court omitted).

⁴ *Id.* 486.

CURRENT DEVELOPMENTS REGARDING JUDICIAL DECISIONS REPORTED IN
THE JOURNAL, 1975-1976

- Alfred Dunhill of London v. The Republic of Cuba*, 44 U.S.L.W. 4665 (S.Ct. 1976), 70 AJIL 828 (1976); reported at 96 S.Ct. 1854 (1976).
- Challoner v. Day and Zimmermann, Inc.*, 512 F.2d 77 (5th Cir., 1975), 70 AJIL 360 (1976); judgment vacated and case remanded, 423 U.S. 3 (1975).
- Cheng v. Immigration and Naturalization Service*, 521 F.2d 1351 (3d Cir. 1975), 70 AJIL 578 (1976); cert. denied, 423 U.S. 1051 (1976).
- De Tenorio v. McGowan*, 364 F.Supp. 1051 (S.D. Miss. 1973), 68 AJIL 533 (1974); 510 F.2d 92 (5th Cir. 1975), 69 AJIL 892 (1975); rehearing denied, 513 F.2d 294 (5th Cir. 1975); cert. denied, 423 U.S. 877 (1975).
- Fund for Animals v. Frizzell*, 402 F.Supp. 35 (D.D.C. 1975); 70 AJIL 837 (1976); affd per curiam, 530 F.2d 982 (D.C.Cir. 1975; amended 1976).
- Hampton v. Mow Sun Wong*, 44 U.S.L.W. 4737 (S.Ct. 1976); 70 AJIL 846 (1976); reported at 96 S.Ct. 1895 (1976).
- Koupetoris v. Konkar Intrepid Corp.*, 402 F.Supp. 951 (S.D.N.Y. 1975), 70 AJIL 839 (1976); affd 535 F.2d 1392 (2d Cir. 1976).
- Real v. Simon*, 510 F.2d 557 (5th Cir. 1975); 70 AJIL 357 (1976); rehearing denied, 514 F.2d 738 (5th Cir. 1975).
- United States v. Lira*, 515 F.2d 68 (2d Cir. 1975); 70 AJIL 142 (1976); cert. denied, 423 U.S. 847 (1975).
- United States v. State of Alaska*, 95 S.Ct. 2240 (1975), 70 AJIL 140 (1976); reported at 422 U.S. 184 (1975).
- United States v. Weiss*, 491 F.2d 460 (2d Cir. 1974), 69 AJIL 179 (1975); cert. denied, 95 S.Ct. 58 (1974); reported at 419 U.S. 833 (1974).
- United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975), 69 AJIL 895 (1975); cert. denied, 421 U.S. 1001 (1975).
- J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168 (Ct.App.N.Y. 1975), 70 AJIL 575 (1976); cert. denied, 96 S.Ct. 126 (1975); reported at 423 U.S. 866 (1975).

BOOK REVIEWS AND NOTES

Edited by Leo Gross

Evidence Before International Tribunals, Revised Edition. By Durward V. Sandifer. Charlottesville: University Press of Virginia, 1975. Pp. xxiii, 519. Index. \$27.50.

This volume is a much revised and expanded edition of Professor Sandifer's pioneering work on the subject of evidence before international arbitral and judicial tribunals, originally published in 1939.¹ While the new version closely follows the organization and presentation of the 1939 edition, it has been extensively revised and expanded in light of new developments. The subject of this work is of critical importance in any rational evaluation of the practice of international law.

Sandifer's opening sentence states his objective: "The primary concern of this study is the process or mode of presenting evidence before international tribunals rather than the determination of what constitutes evidence" (p. 1). Sandifer has divided his book into ten sections. The first nine treat (in order) the nature and sources of the rules of evidence; the order and time of its submission; its production; its admission; documentary and testimonial evidence; evidence subject to special rules of admission and evaluation; propositions not requiring proof; and rehearings and revision on the basis of newly discovered or fraudulent evidence. The last section contains his conclusions.

The substance of Sandifer's study has been enlarged not only by a relatively extensive treatment of the jurisprudence of the International Court of Justice and postwar arbitral tribunals but also by the acknowledgment of the postwar scholarship in the area and of the increasing treatment of the adjective aspects of international adjudication which has been provided, not in unimportant part, by *The Procedural Aspects of International Law Series* (of which this volume is the thirteenth) edited by Richard B. Lillich. Sandifer's study also addresses a number of the particularly interesting secondary areas where the submission, admissibility, and reception of evidence by international tribunals can be seen to operate. He provides, for example, detailed and fascinating accounts of little-known matters such as proof of nationality, maps, *ex parte* evidence, the testimony of interested persons, hearsay, judicial notice, and fraud.

This is a happy combination of the two extremes presented by scholarly studies in international law. On the one hand are *magna opera* such as Hackworth or Whiteman; indeed, such works tend to be more in the nature of detailed collations than of analytic or intuitive essays in theory.

¹ Reviewed in 34 AJIL 165-66 (1940).

The other end of the spectrum is of course occupied by more theoretical analyses and explorations such as the contributions of Lauterpacht, Jessup, McDougal, and Falk. In the middle, balanced neatly between the analytic and synthetic, the descriptive and the intuitive, lie the major reference works which have been prepared by scholars and practitioners deeply concerned with the onward thrust of international law as well as positivistic or descriptive analysis. Instances of these works are those of Shabtai Rosenne (whose two volume work on the International Court of Justice is of course without peer) and the subject of this review.

It is in the nature of international legal proceedings, whether arbitral or judicial, that there is always too little relation between one proceeding and another. Rules established in one arbitration or set forth in one case are noted, distinguished in part, compared with, and collected together with rules established by other tribunals or courts, with too little attention devoted to their harmonization. One of the key points that emerges from Sandifer's work is the contrast in form and content between the rules of evidence adopted and applied by permanent international tribunals, such as the Permanent Court of International Justice, and those of arbitral tribunals when operating in the context of their own *compromis* or *protocoles d'accord*. The rules of procedure of the International Courts as applied and developed through their jurisprudence at least possess the virtues of accretion and precedent. There is an inherent imbalance in the development of precedent by ad hoc international arbitral tribunals, on the one hand, and by an International Court possessed of a statute and rules which change little from year to year, on the other. Sandifer's book reflects this; indeed, those passages concerning the rules of evidence applied and interpreted by the International Courts possess an internal sense of development and progression which the necessarily lengthier passages concerning arbitral decisions cannot embody.

As acknowledged in the excellent brief introduction written by Judge Jessup to the present volume, *The South West Africa Cases (South West Africa, Second Phase, Judgment, I.C.J. Reports 1966, at 6)* are an important source of the development of the law of evidence in international proceedings; it was in this tortuous litigation that the rules of evidence were vehemently and repeatedly tested for application by both sides to the dispute. Only in this section of the book have certain inaccuracies of treatment apparently arisen.² *The South West Africa Cases* presented a panoply of questions, many of which remain unresolved, concerning the application of rules of evidence in the International Court of Justice in an intricate and protracted litigation involving numerous issues of law and fact. The immense length and prolixity of the oral proceedings in these cases present a formidable thicket which very few scholars have taken the time and trouble to penetrate, and Sandifer has understandably been

² The reviewer must confess to a degree of *parti pris* in these observations, having served as Counsel to the Applicant States in the so-called "Second Phase" (i.e., what was otherwise expected to have been the Merits) of these proceedings.

unable to treat several of the more significant points which became issues of great importance and upon which the very disposition of the case can be said to have turned.

At pages 340-43, for example, Sandifer describes the extraordinary controversy surrounding South Africa's presentation of numerous witnesses and (later) experts. In writing that: "The basic difficulty was inherent in the nature of the objective of the South African Government for its expert testimony, combined with the flexible procedure followed by the Court in examination" (p. 340), Sandifer does not convey the true nature of the dispute which was, indeed, an evidentiary dispute. The essential point was that the Applicants had taken the position that there were essentially no issues of fact in dispute between the parties (as opposed to legal arguments or legal conclusions); this was in response to the South African offer of an enormous list of witnesses to be adduced in support of the proposition that *apartheid* was beneficial and/or necessary in South West Africa. The Applicants argued that a cumbersome parade of witnesses was therefore wholly unnecessary.³ In consequence, Applicants went so far as to rest their entire case upon arguments of law (and even to incorporate all of Respondent's pleadings into their own by reference!). South Africa promptly asserted that Applicants' position—that there were no important issues of fact in dispute between the parties—was in substance a concession by the Applicants that all of the South African arguments and conclusions were correct; including the final value judgment that *apartheid* was not inconsistent with the South African Government's responsibility, under Article 2 of the Mandate, to "promote to the utmost the material and moral well-being and the social progress of the inhabitants . . ."

This alleged concession formed the basis for the entire subsequent development of the case. Applicants hotly denied that they had made a concession of a *legal conclusion* that *apartheid* was either appropriate or proper, and the issue became even more confused as South Africa continued to insist upon its right to present its witnesses, albeit now necessarily identified as "experts." Sandifer essentially misses the somewhat insane subtleties of the litigation as it developed: a veritable Catch-22 in the annals of international law. In order to resist the waiver of any rights sought to be established by it in the litigation, South Africa persisted in leading witnesses who had obviously been prepared to testify as to questions of fact, but who were now most uncomfortably to be presented and evaluated as "experts" testifying on the issue of the existence or quality of an "international norm or standard of non-discrimination." Since the Applicants' case had been rested on the law, "experts" as to that law, including a geographer, a social scientist, a newspaper publisher, a theologian,

³ A large part of the Applicants' rationale in this respect stemmed from the extraordinarily detailed written pleadings—the *Counter-Memorial* alone ran to ten volumes—submitted by South Africa, which contained a diligently laid out description of all aspects of life in South West Africa, including particularly a detailed enumeration of all the relevant statutes and regulations implementing the policy of *apartheid* in the territory.

and an architect of "Bantu Education," were created out of thin air. It was this transformation that led to the intricate footwork attendant on the *voir dire*, which, unhappily, is almost entirely as incomprehensible in the recorded Oral Proceedings as it was in the courtroom; yet it should be stated for the record that the sophisticated issue of the transformation of factual testimony into expert advice had never been so dramatically presented to the Court or its predecessor (see pp. 340-43).⁴

Turning to another important aspect of the South West Africa litigation, this reviewer finds that Sandifer seems in part to have missed the point in respect of the famous proposal by South Africa that the Court (or a committee thereof) make an "inspection" of the Mandated Territory. This is discussed in the section on inspection of evidence *in situ* by the method of *descente sur les lieux* (pp. 346-48). Several points concerning the South African offer to the Court, which need to be stressed in order properly to understand not only the reaction of the Applicant states but also the decision of the Court itself, have not been fully grasped in Sandifer's treatment (see, e.g., his discussion at pp. 347-48). While he acknowledges that the proposal for the *descente sur les lieux* in South West Africa was conditioned upon the Court's acceptance of a similar inspection tour to be conducted in each of the Applicant states (Ethiopia and Liberia) as well as in other independent African states not parties to the litigation, he does not acknowledge the legal difficulties, relating to state sovereignty and relevance of issues, implied by such a condition. Moreover, he appears not at all to reflect that the proposed "inspection" was intended to be definitively limited to a mere *visual*, or *passive*, inspection of the territory and of its inhabitants. (It was for this reason that the proposal acquired the rather rude nickname of the "Safari Proposal" among those present at the proceedings.) It is extremely important to understand that although South Africa was directly invited by Applicants to expand the scope of its proposal so as to include the possibility of *taking testimony from the inhabitants* once the court (or its committee) found itself within South West Africa, this invitation was vigorously resisted; issue was then of course drawn on the *bona fides* of South Africa's invitation to the Court on this as well as on other grounds.

Leaving aside the details of this particular litigation and turning to more general considerations, it can perhaps be observed that the field of evidence is one in which a fundamental antimony of public international law practice is manifested with exceptional clarity. On the one hand, it is essential for the court or arbitral tribunal to set its own house in order and to impose a logical and rational framework of rules upon the litigants; on the other hand, state sovereignty remains an issue with overtones far broader than the scope of any given procedural or evidentiary problem presented for adjudication. Especially in contentious proceedings insti-

⁴ One must note in passing that the narrower but nevertheless very useful study by Gillian White on *The Use of Experts by International Tribunals* (1965) was, by reason of its publication date, not able to consider the issues just described.

tuted by application (rather than by special agreement or *compromis*), which by their very nature can be seen to be inherently "unfriendly" proceedings where the sovereign wills of states are working against each other in an international judicial arena, the Court finds it difficult to impose limitations or direction upon balky states. Thus (as in *The South West Africa Cases*) the International Court is reluctant to impose restrictions upon the production by the parties of meaningless, contradictory, or irrelevant evidence, just as much as the Court is reluctant not to accede (in substance) to requests of the parties for extensions of time-limits in the case of filing pleadings, preparation for oral proceedings, and the like.⁵ (Perhaps the cumulation of the seemingly interminable written and oral proceedings in *South West Africa* and the *Barcelona Traction* cases has by now had a beneficial, even if painful, effect on the Registrar and the Court.) In bilateral arbitral tribunals and claims commissions, however, there is far less likely to be a real dispute concerning fundamental principles concerning the production and admissibility of evidence than in instances where there has not been a specific treaty or *compromis* establishing the arbitral tribunal and its rules of procedure.

In his thoughtful conclusions (pp. 457-71), Sandifer alludes to this essential conflict between the demand for freedom and the necessity for restraint which must always remain one of the critical conceptual areas in international law. Indeed, the field of evidence is one where this conflict is doubly presented and restated: "Tribunals uniformly assert two freedoms—freedom from restrictive rules of admission and freedom to evaluate evidence admitted on submission by the parties" (p. 457).

In conclusion, the reviewer finds this volume in general to be an expert history and analysis of the production and the use of evidence in international tribunals, probably the only such work in its field of comparable scope and significance.⁶ The revision is more than an updating; to a great extent it is a reconsideration of the material originally set down in 1939. This volume stands as an important addition to the library of every international lawyer and an invaluable resource for the practitioner involved in any proceeding before an arbitral tribunal or the International Court.

KEITH HIGHET

⁵ In particular, in the context of *ex parte* evidence (discussed at pp. 240-64) it should not go unnoted that the Applicants made an early offer to record testimony by way of deposition or interrogatory in order to condense the time and effort required for the conduct of the oral proceedings themselves and to reduce the burden of the parties and the Court. Although the Court was squarely invited to permit such techniques, it acceded to Respondent's insistence that it not be deprived of the opportunity to present its witnesses in person.

⁶ One minor formalistic comment on the 1975 edition would be to regret that, perhaps for economic reasons, the appendices which accompanied the 1939 edition have been removed. These consisted of the relevant statutory and rules material relating to the International Court as well as other relevant provisions of international conventions.

Resignation in Protest. By Edward Weisband and Thomas M. Franck. New York: Grossman Publishers, 1975. Pp. xi, 192. Appendices. Reference Notes. Index. \$10.00.

Professors Edward Weisband and Thomas Franck have given us a lively and provocative political essay on the conflict between personal conscience and team loyalty among high public officials in the United States. Combining backgrounds in political science, international studies and law, the authors weigh loyalty to principle, loyalty to the public, personal integrity, and, repeatedly, ethical autonomy against such suspect values as team play, careerism, conformity, and group loyalty. Their central concern is with men and women in power who "wrestle mightily with their consciences—and win" (p. 1) and with those who resign because of some strong disagreement but go quietly without making a fuss.

Since the idea of ethical autonomy assumes major importance in their argument, it should be noted that the ethical values they invoke are wholly to be determined by each individual on his own. "An individual is ethically autonomous to the degree that he 'sticks to his guns' about what he thinks, hears, sees, feels, or knows, even when to do so puts him in conflict with society's, or his team's, conventional wisdom and with such social values as conformity, loyalty, and institutional efficiency" (pp. 3-4). The authors are not very much interested in the quality or consequences of the individual judgment. Indeed, the "social importance of ethical autonomy lies not in what is asserted but in the act of asserting" (p. 4).

Illustrative of the wide range of questions of conscience invoked in resignations accompanied by public protest are the U.S. refusal to support the racist Boers against Britain (Webster Davis), Woodrow Wilson's growing sympathy with Britain and France against Germany (William Jennings Bryan), Woodrow Wilson's pacifism (Lindley Garrison), Henry Morgenthau's effort to sell planes to France and buy silver from Loyalist Spain and Nationalist China (Wayne Chatfield Taylor), tinkering with the gold standard (Lewis Douglas), FDR's decision to run for a third term (James Farley), the nomination of an oil man to be Under Secretary of the Navy (Harold Ickes), Truman's refusal to give Joseph Stalin what he wanted after World War II (Henry Wallace), failure to proceed with a supercarrier (John L. Sullivan), tariff and trade policy (Kenneth Davis, Jr.), and President Nixon's order to discharge Special Prosecutor Archibald Cox (Elliot Richardson and William Ruckelshaus).

Since the authors offer no ethical compass bearings of their own, it should be noted that they find in protest resignations the following positive values: the exposition of unconscionable government policy, the drawing of public attention to a hidden or insufficiently debated issue, inside information necessary to an informed debate, the possible reversal of policy through political action, and the furnishing of leadership to opposition groups who might otherwise wander outside the system into counter-

culture or violent activities for their remedies. William Jennings Bryan's resignation from the Wilson cabinet illustrated for the authors the flowering of the values of protest resignation although, with a note of sadness, they conceded the decline of the Great Commoner by the time of the Scopes trial in Tennessee.

Resignation in Protest examines 389 American senior officials who resigned between 1900 and 1970 on matters of policy and found that only 34 (8.7%) resigned with public protest. The authors are concerned about the penalties imposed by a conformist society upon those who resign with a blast at the persons or policies which prompted their resignations. They found, for example, that some 20.6% of those who resigned quietly were subsequently appointed to federal posts at the same or higher level while only one of the 34 public protestors (3%) received such appointment.

A comparison is made with British experience where 42 (53.8%) of the 78 resigners left office with a public declaration of protest. That the British system deals more kindly with protesting resigners is indicated by the fact that 45.2% of them are returned to equivalent or higher posts at a later date. That the authors find the British system more wholesome led them to suggest that an American President be required to select his cabinet from serving members of Congress. Their argument that this could be done without a destruction of the checks of the doctrine of separation of powers or without the institution of full parliamentary sovereignty is unconvincing.

This tantalizing book whets the appetite but does not satisfy it. It contains glimpses of issues which are central to its main themes which are not pursued in depth. For example, under our Constitution "The Executive Power shall be vested in a President of the United States of America (Article II)." Other officials of the Executive Branch are subject to the President who is elected by the people to play that role. At what point is the democratic process frustrated if officials of the Executive Branch do not observe a constitutional deference to the President? Secretary of State George C. Marshall was reported to have stated what was probably an extreme view of this point when, on one occasion, President Truman pulled the rug out from under him on an important matter. When friends suggested that he ought to resign, Secretary Marshall is said to have replied, "No, gentlemen, you do not accept a post of this sort and then resign when the man who has the constitutional responsibility for making a decision makes one. You may resign at any other time and for any other reason but not for that one." There can always be, of course, genuine questions of conscience which would impel a resignation but the constitutional situation undoubtedly has a strong bearing upon whether or how to resign if there are differences. Professors Weisband and Franck drew back somewhat from the full consequences of personal autonomy when, in their concluding page, they asked only for a "healthy amount of ethical autonomy" (p. 192).

The authors' preference for the more frequent protest resignations in Britain suggests another point deserving consideration. In Britain a cabinet member resigns from a Ministry-in-Parliament. When Anthony Eden resigned from the Chamberlain government, the Prime Minister and his policy had the support of the House of Commons. Such a resignation is, in contrast with the American scene, only half a resignation; Anthony Eden remained in the House of Commons with his full share in its sovereign deliberations. Should a high official of the American Executive Branch resign when the Congress takes action which he considers outrageous and deeply offensive to his own conscience and to his sense of national interest? Our practice is against such resignations; the official is expected to do the best he can despite foolishness or worse on Capitol Hill. It is not enough simply to say that the voice of Congress expressed by statute is "the law"; so is the voice of the President to one of his subordinates, if his instruction is within the law and the Constitution. The authors here, however, were searching for restraints upon the President within the Executive Branch itself and did not address themselves to ethical autonomy over against the Congress or, for that matter, the courts.

The authors make one important point which deserves more detailed examination by an investigative historian or reporter. They said, "If all the top State, White House and Pentagon officials whose recently published memoirs place them squarely in the camp of the doves had indeed been doves, Presidents Kennedy, Johnson, and Nixon must have conceived, organized, administered and almost fought the war alone" (p. 86). Exaggeration is protected by the First Amendment, fortunately, but the phenomenon is intriguing. George Ball, whom the authors treated rather roughly, almost literally stood alone in winning the respect and admiration of his Presidents and Secretary of State by the vigor and clarity of his dissenting views in two administrations. A number of others, however, who expressed their dissent publicly after they left government sat silent while they were holding public office. Why the silence? Professors Weisband and Franck found several possible explanations in commenting upon a few individual personalities. This reviewer has discussed the matter with a number of friends of diverse points of view and is persuaded that the real explanations are extraordinarily complicated and range from personal timidity to the failure of policy processes to force dissent into the open and to belated efforts to take a popular stand.

The authors are concerned about the fact that so many officials who resign do so in a "gentlemanly" manner with a customary exchange of regret and regard rather than with a public criticism of the policy which prompted the resignation. They suggest that such gentlemanly resignations deceive the public and that the resigner has a duty to make his complaint known. The right of the authors to assert the existence of such a duty cannot be challenged, but neither can the right of the resigned official to reply "Nonsense!" When a person leaves public office to become a private citizen, he has all the rights and privileges of a

private citizen; he is not a public official out on parole for the rest of his life. He has the constitutional right of silence, unless under subpoena by a duly constituted authority. He may choose to get away from the tensions and turmoil of political controversy, to recapture his privacy, to relieve his family of the penalties imposed by his public service, or to commit his energies to whatever role in private life he elects to play. It is his privilege, but not his duty, to go public; it is his choice, whatever professors may say.

Finally, an exaggerated view of personal autonomy (whether ethical or not) engages a fundamental aspect of democratic process. Basically, democratic institutions are designed to allow us to settle our differences by peaceful means. No one gets all that he wants and others do not always act as we would wish. Democracy involves a never-ending process of adjustment and compromise and a tolerant respect for other views. Woodrow Wilson's conscience was at least as finely tuned as that of William Jennings Bryan. Those whose views differ from our own are also persons of conscience and questions of public policy are almost never a choice simply between right and wrong. To stick to my guns about what I think, hear, see, feel, or know may be heroic but it may also invite my imprisonment by illusion, fanaticism, or error. If each of us as citizens were to insist that our voice is the voice of God, democracy would dissolve into a dictatorship of the strongest or into Hobbes' jungle. If Professors Weisband and Franck attach high importance to ethical autonomy over against the whole world, perhaps they should not inhale too deeply. "I just might be wrong" has played a civilizing role which this reviewer would not wish to lose.

Resignation in Protest will persuade some and irritate others, but it will bore no one. It should be widely read.

DEAN RUSK

Beiträge zum Luft- und Weltraumrecht: Festschrift zu Ehren von Alex Meyer. Edited by Manfred Bodenschatz, Karl-Heinz Böckstiegel, and Peter Weides. Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG, 1975. Pp. xi, 482.

This *Festschrift*, containing twenty-two contributions on air law and fourteen on space law, was published on the occasion of the retirement of Alex Meyer, as Director of the University of Cologne's Institute of Air and Space Law, which Meyer founded in 1950. The book contains a bibliography of more than 200 of Meyer's works published from 1904 to 1975. Contributed papers from an international group of authors appear in the original languages, including German, French, Spanish, English, and Dutch.

The collection covers diverse subjects ranging from changes in modern German air law generated by the introduction of supersonic transports to an assessment of the historical significance of the Paris Air Navigation

Conference of 1910 (one of the most thorough, scholarly, and well-documented papers). Many papers directly or indirectly assess Meyer's contributions to air and space law over seven decades, while presenting views on the past, present, and future implications of public and private international air law and space law.

The general survey papers and the in-depth papers on particular subjects are well written, generally scholarly, and amply annotated. Many contain legal analyses, often of German air law and regulations, but some are historical or organizational, *e.g.* there is a survey of the history of air law in Russia, a review of cooperation among European air carriers as manifested in the work of the Association of European Airlines, a discussion of the international legal implications of direct broadcasting by satellite, and a survey of the Interkosmos program of space cooperation among the USSR and other communist countries including Cuba, Mongolia, and several in Eastern Europe. The world's first author of a doctoral dissertation on space law nostalgically recounts a tour of the United States in 1957, during which he spoke at about 30 universities on space law.

An element reasonably to be expected by a reader in such a work would be a synoptic biography of this outstanding European lawyer, scholar, teacher, and administrator, Alex Meyer, but no single paper in the collection presents a picture of this remarkable man and his career.

The high editorial quality of the *Zeitschrift für Luft- und Weltraumrecht*, of which this is a special edition, is apparent throughout. This book is a useful and reliable reference work on the subject areas with which it deals formally and provides some informal and interesting insights into the life and works of Alex Meyer. While this is a work of interest particularly to air and space law specialists, it also offers interesting reading for the student of international relations.

S. E. DOYLE

Global Reach. The Power of the Multinational Corporations. By Richard J. Barnett and Ronald E. Müller. New York: Simon and Schuster, 1976. Pp. 508. Index. \$4.95, paper.

Since its publication in the *New Yorker*, *Global Reach* has become the classic brief against multinational corporations. Its clever, ironic, angry style makes it highly readable considering the complexity of its subject matter. It is hard not to sympathize with the authors' preferences for a world in which individuals and communities could better determine their own destinies, in which traditional home products were not displaced by Feds and Coca Cola, and in which the yawning gaps between classes and nations were drastically reduced. Yet, when one buckles down to analyze the book as the serious work its references and footnotes hold it out to be, one is seized with doubts.

Some of the doubts arise because the accusations against the multinationals are simply too sweeping. While their participation in some econ-

omies is large enough to make it believable that they had the stated effects, their role in India, for example, is too miniscule to make it plausible that they are a significant cause of its poverty. Some of the allegations are contradictory or nearly so: multinationals reach out to enforce American rules against trade with Communist lands (p. 102) but are ingenious in circumventing them (p. 77). They use transfer pricing to divert income from the U.S. Treasury (p. 262) and also to divert income from developing countries (p. 410).

Another cause for doubt is the authors' handling of really difficult questions where data are scarce and experts disagree. Consider, for example, the debate over the effect of multinationals' foreign investment on employment in America. Measurement involves answering difficult questions as to what would have happened "but for" those investments. Some studies seem to show that, absent American investment abroad, we would not have made the same sales via exports but would have lost the markets to foreign rivals, especially multinationals. Accordingly, our workers do better producing components and capital equipment for overseas American subsidiaries than they would if foreign firms had those markets all to themselves. Furthermore, administrative and research and development work is generated at home. The authors begin to acknowledge these complexities but then veer off to the position that since some workers are displaced the effect of the multinationals is negative (pp. 301-02).

Events move rapidly in the multinational field. There are already signs that more countries can wrest more from multinationals. This reflects both economic changes in favor of mineral producers and greater regulatory sophistication, developed to a large extent by the Latin American writers on *dependencia* whose work underlies much of *Global Reach*. Indeed, there now appears an opposite danger that nations may become too mercantilistic and begin to dismantle a world economic order that has after all done much to meet many real needs.

DETLEV F. VACTS *

Etude de doctrine et de droit international du développement. By A. Colombeau, C. Davin, C. Gueydan and C. Rucz. Paris: Presses Universitaires de France, 1975. Pp. viii, 384. Annexes.

Four doctoral dissertations presented before the Aix-Marseille University are gathered under this title. They have been written independently and at different times, which explains why the book is somewhat heterogeneous. Its unity derives only from the fact that the papers are all devoted to problems of development, approached, however, from different angles.

Alain Colombeau's study on the Catholic Church and the Third World deals with the doctrine of the Church in the field of development (and,

* The views expressed herein are solely those of the author and do not necessarily represent those of the Department of State

incidentally, of colonization). The other studies may be classed under the leading "international law of development," which is slightly misleading because the legal analysis is rather slim.

Claude Gueydan's paper on the organization of UN aid to developing countries (mostly devoted to UNDP) and Claude Rucz's on the principles and techniques of this aid within the UN system are concerned with some institutional aspects of the activities of UN bodies in favor of developing countries. Both of them manifest a certain ambiguity on the concept of the international law of development, a term this reviewer introduced to the vocabulary of international law some years ago, and which implies considering law not as a self-sufficient technique but as a system functioning in a political, economic, and social environment. However, even in such a view, legal analysis must remain central. Here it is rather peripheral. Starting with a brief history of the UN bodies in the field of technical assistance and preinvestment, the first study appraises the Jackson report and the decisions taken in relation to it. The second describes (according to a disputable distinction between "vertical" and "horizontal" coordination) the various organs which have, or try to have, a coordinating activity within the UN system for development, and questions their efficiency.

In the fourth contribution, on volunteers for development, Christian Davin devotes a few pages to the legal status of volunteers, but is more at pains to describe their financial status and the nature of their activities and of the organizations which employ them.

For the reasons mentioned above, such fields of study require interdisciplinary treatment, which is difficult and complex. In short papers it is almost impossible to embrace all the factors to be taken into account. The subjects discussed here are too broad and could only be treated descriptively. The studies yield information which is useful but too general, and they do not always sustain the interesting personal reflections which accompany them. The discrepancy between the breadth of the problems discussed and the wealth of the documentary material collected is most apparent in the two studies of the UN system for development, which are not without errors of fact. The information on the volunteers, on the other hand, is interesting and some of it is new (notably the part obtained through interviews), but the fundamental problems raised by the use of volunteers in developing countries has not really been put in proper perspective.

Similarly, the study on the Catholic Church is worth reading for the great number of quotations from papal encyclicals (in particular John XXIII's and Paul VI's) and from Vatican II. It underlines the responsibility of Christians (of the Christian world, which is largely the same as the developed one) and, therefore, of the churches, in the "scandal of underdevelopment." Its conclusions pose some serious questions, notably about the relationship between peace and development, synthesized by Paul VI's famous sentence in his speech before the General Assembly:

"Development is the new name of peace." That would be true only if the development process were well balanced. If it were not, it could generate crises and violence. It is a point worth pondering.

MICHEL VIRALLY

Le Contrat économique international. Published by the Faculté de Droit de l'Université Catholique de Louvain. Brussels and Paris: Etablissements Bruylant and Editions A. Pedone, 1975. Pp. x, 586. Bibliography. Index. Analytical Schedule.

This book documents the present status and great potential of a most fascinating area of international law. It seeks to answer the question whether actual legislation concerning the *reglementation* of international commerce offers a satisfactory solution to the difficulties prevailing in the field.

Fifteen law professors, corporate counsels, and practicing attorneys representing a number of countries contributed to this book which comprises the research results of the VII^e *Journées d'études juridiques Jean Dabin* sponsored by the *Centre Charles De Visscher pour le Droit International*.

In the first part of the book, Octavian Capatina, Research Director of the Academy of Social and Political Sciences in Bucharest, analyzes trade agreements between governmental bodies and foreign parties as seen from a socialist country's viewpoint. He illustrates how the increasing importance of East-West relations now has and will have more effect in the future on international contract law.

The remainder of the first part is devoted to the attempts at unification in international and transnational law, such as the E.E.C. proposal for new conflict solutions. Paul Jenard, of the Belgium Foreign Ministry, and Bernard Hanotiau, of the *Centre*, analyze in detail the proposed E.E.C. convention on the law applicable to contractual and noncontractual obligations, which would provide a codification of the conflict rules. Professor François Rigaux, of the *Centre*, expands on the unification of conflict rules through an international code. He uses the uniform laws as examples, particularly the uniform law on the international sale of chattels. Julian D. M. Lew, an English barrister and research assistant at the City of London Polytechnic, gives an overview of the cases which have been heard by international arbitral tribunals. This chapter contains an excellent analysis of the conflict rules which have been applied in arbitration and illustrates the significance of arbitration in international commerce.

The second part of the book deals with comparative law. Professor Philippe Kahn, of the University of Dijon, describes the French experience, and Alphonse Huss, Honorary Attorney General of Luxembourg, does the same for his country. Octavian Capatina provides a Romanian example, and Professor Ahmed S. El-Kosheri, of the Ein Shams University in Cairo, writes an interesting historic analysis of the situation in the developing countries, especially with regard to oil concessions.

A special effort went into the preparation of the third part of the book. Three members of the *Centre* met with eight lawyers of outstanding business enterprises and formed a committee which drafted and submitted to corporate attorneys of about 100 Belgian enterprises a questionnaire concerning the practice with respect to international contracts in Belgium. Although the inquiry was limited to Belgian practice, it supplies a good summary of the many legal questions which arise in international contracts. It contains a discussion, from the corporate attorney's point of view, of contract provisions concerning questions of jurisdiction and dispute settlement. Also discussed are the intrinsic validity of international contracts and the rules of interpretation regarding them, the origin of contractual provisions, and specific aspects of international contracts. The first two chapters of this part, comprising a compilation and analysis of the results of the questionnaire, prepared by Michel Verwilghen and other T.C.L. faculty members, contains such interesting information that one hopes at least this part of the book will soon be translated into other languages, especially English.

Based on the inquiry, Jean Van Uytvanck provides a summary of the major issues arising from the Belgian viewpoint on international contracts in which he finds a synthesis in the continued efforts by international jurists to resolve the disputes. The third part concludes with Professor Eigaux's critical synthesis of the practice of international contracts in Belgium.

This book provides deep insight into the major problem areas for international contracts and is a valuable source of information for all interested in international contract law.

EBERHARD H. ROHM

The "Conflicts" Process. Jurisdiction and Choice in Private International Law. By David C. Jackson. London: British Institute of International and Comparative Law; Dobbs Ferry: Oceana Publications, Inc., 1975. Pp. xxxv, 408. Index. \$22.50.

To those familiar with English contributions to conflicts learning, this volume's title suffices to reveal its deviant character. Typically, English writings report the relevant case law in systematic fashion, adding (with respect) a seasoning of criticism. They accept the courts' methods and assumptions, though brief note may be taken of American heresies. However, that fidelity to precedent which has tied the treatment of foreign tort claims in English courts to a delphic passage in a century-old opinion has kept methodological inquiry within narrow bounds.

Mr. Jackson refuses to be confined. I know of no frontal attack on English doctrine and methods that approaches in depth and vigor his analyses of decisional processes for determining judicial jurisdiction, recognition of foreign judgments, and selection of rules of law to govern cases with foreign contacts.

Mr. Jackson, formerly at Monash University, now at Southampton, has evidently been led off the beaten path by the American critics of the received doctrine, those who undermined the 1934 *Restatement of Conflicts of Laws*, transformed its 1971 successor, *Conflicts Restatement, Second*, and have won over an increasing number of American courts to their increasingly diverse views. After surveying these early in his volume, Mr. Jackson embarks on a relentless and, for the American reader, sometimes tedious examination of the processes used in leading English cases in his subject's three fields. Unlike most writers here and abroad, he finds the bases of judicial jurisdiction suffering from the same weakness that undermines the choice-of-law process: undue dependence on broad categories to the disregard of the specific issues posed by the cases and state interests in their resolution.

At the end of the volume, Mr. Jackson returns to the innovating views of the Americans. He does not enlist in any camp, though perhaps a little proselytizing could win him over. He examines a number of American cases, viewing *Tooker v. Lopez* with special favor, including (rather surprisingly) the three Fuld rules. He stresses that "the focus must continuously be on the specific issue . . . and the inquiry directed to establishing where control of that issue should lie" (p. 388). He would encourage judicial investigation "into the policy of potentially relevant rules and an assessment first of" their applicability "and secondly on the greater claim" to it (p. 388), a matter depending on the contact between the specific issue and those rules. But "*the actual resolution of the dispute* plays no part in the selection process" (p. 387, author's italics). (Are policies sterile?)

How the transformation in process Mr. Jackson urges might be brought about is not suggested. A section on *Chaplin v. Boys* is sub-titled, "a lament." Packing the House of Lords aside, I can think of no remedies other than by statute or convention.

DAVID F. CAVERS

Los Fondos Marinos y Oceanicos. Jurisdicción nacional y Régimen internacional. By Francisco Orrego Vicuña. Santiago: Editorial Andres Bello, 1976. Pp. 451.

As Professor of International Law at the University of Chile and Director of its Institute of International Studies, Chief Legal Advisor to the Organization of American States, alternate representative of Chile to the Third UN Conference on the Law of the Sea, and the author of a number of previous works on the law of the sea, Francisco Orrego Vicuña has brought an internationally recognized expertise to bear upon the problem of the seabed, national jurisdiction, and an international regime. The result is the best text this reviewer has so far seen on this subject.

Los Fondos Marinos is a systematic study of the evolving international law of the seabed and the scientific, technological, economic, and socio-

political realities which have resulted in profound changes in this area of international law. Following a preface by Arvid Pardo and a prologue by F. V. Garcia-Amador, Professor Orrego Vicuña presents a detailed analysis of the seabed in two parts. The first, consisting of an introduction and five chapters, is devoted to a detailed examination of the question of national jurisdiction over the continental shelf and its resources. Included are freedom of the seas, the nature and basis of the laws of the littoral state concerning the continental shelf, national legal claims from 1940 to 1958, legislative antecedents to the Geneva Convention on the Continental Shelf, state practice and legislation relative to the continental shelf since then (including an analysis of the criteria of exploitability, depth, and distance), as well as the effect of scientific and technological developments.

The second part of the book, consisting of four chapters and a conclusion, is concerned with the international regime of the seabed and the limits of national jurisdiction. Included are an extensive discussion of the concept of the seabed as the common heritage of mankind, limits of littoral state jurisdiction, the international regime and machinery, participation of landlocked states, peaceful uses, and problems of pollution. A postscript discusses the work of the Third UN Conference on the Law of the Sea through the Geneva session of 1975.

Los Fondos Marinos is unique in its extensive utilization of UN documents, including those of the Seabed Committee and the Third Law of the Sea Conference. For those who do not read Spanish, one hopes an English translation will be forthcoming shortly.

JOHN A. VOSBURGH

Third United Nations Conference on the Law of the Sea. Documents of the Geneva Session 1975. Compiled by Renate Platzöder. Frankfurt am Main: Alfred Metzner Verlag, 1976. Pp. xiv, 322. DM 44.

This is a reproduction of the *Informal Single Negotiating Text and Text of Settlement of Disputes* drawn up by the three Committee chairmen and the co-chairmen of the Informal Working Group at the request of Hamilton Shirley Amerasinghe, President of the United Nations Conference on the Law of the Sea, at the conclusion of the third session in Geneva. In addition to the basic texts there are a number of working documents, draft articles, Blue Papers, White Papers, Conference Room Papers, etc. for Committees I, II, and III which are listed or reproduced. The basic texts are reproduced in many different formats and are readily available, but the working documents are not. Since the proceedings of the three main Committees are off the record and largely unrecorded, the real value of this collection is that it makes these working documents generally available.

The Committee I working documents include a list of documents submitted during the Caracas session of 1974 along with draft articles con-

sidered at Geneva in 1975, and working documents submitted by the USSR on the exploitation of the seabed and by Czechoslovakia on revenue sharing and the organization of the International Seabed Authority. Also included are proposals by the Working Group on exploration, exploitation, and joint ventures in relation to the utilization of the deep seabed.

The working documents of the Committee II are somewhat more numerous than those of Committee I, largely due to the greater scope of that Committee. They include a list of documents submitted to Committee II during the Caracas session as well as draft articles by Ecuador on the territorial sea and Malaysia on the archipelagic principle along with Blue Papers on historic bays, baselines, high seas, land-locked states, and geographically disadvantaged states. There are also White Papers on the territorial sea, marine spaces, and submarine cables and pipelines, as well as a consensus text by the Private Group on Straits.

The working documents of Committee III are the most numerous of all because the responsibilities of that Committee include scientific research, pollution, and environmental regulation, which also fall within the province of the other two Committees. There is again a listing of documents submitted to the Caracas session, and several draft articles on scientific research, pollution, and transfer of technology by the Committee of the Whole. In addition there are several Conference Room Papers on scientific research and marine pollution, which are indicative of the complexity of these topics.

Working documents by the Group of 77 on the exclusive economic zone, and the Evensen Group on the marine environment, the economic zone, and the continental shelf are reproduced. The proposals of the Group of Land-locked and Geographically Disadvantaged States are also included as well as proposals by the European Community on fisheries and the transfer of technology.

The introduction states that "the envisaged Caracas Convention . . . will certainly reflect the power balance between North and South, East and West, rich and poor, old and new nations, long, short and non-coastlines more clearly." This collection of documents related to the Geneva session of 1975 is a reflection of this emerging power balance and should be of interest and use to students, teachers, diplomats and others as the Conference moves slowly toward the elusive "Caracas Convention."

DAVID L. LARSON

Foreign Relations of the United States, 1949, Volume II, The United Nations: The Western Hemisphere. (Dept. of State Pub. No. 20520). Washington: U.S. Govt. Printing Office, 1975. Pp. xii, 801. Index \$10.40.

This volume contains documentation not only on the United Nations, but also on the Western Hemisphere. The latter documents relate to some extent to U.S. policy and actions concerning Canada, but mostly to U.S. relations with the South American Republics.

Practically all of the UN part of the book deals with the fourth regular session of the General Assembly which opened in New York on September 20, 1949. In regard to the second part of the third regular session of the General Assembly in New York, April 5 to May 18, 1949, an Editorial Note (p. 339) states that "This meeting is not treated as such in *Foreign Relations* as the Assembly and its committees continued under the same organization" as at the first part of the session in Paris. For important issues considered at the second part "with significant results," the Note refers the reader to the appropriate subjects in this and the 1948 *Foreign Relations*, Vol. I, or in other volumes of the 1949 series.

Reaffirmation of the general U.S. policy to support and strengthen the United Nations was embodied in President Truman's inaugural address on January 20 and in the cornerstone ceremonies at the UN Permanent Headquarters on October 24. Dean Rusk, then Deputy Under Secretary of State for Political Affairs, stated "from direct experience" the effect of the standards of the UN Charter on U.S. policy. On difficult issues of policy the "recurring questions" are: "How does this fit the Charter?"; "How will this look in the United Nations?"

Upon recommendation of the third session, the fourth session of the General Assembly considered the Secretary-General's proposal for the establishment of a UN security guard. In a position paper prepared in the Department of State, the U.S. Delegation to the fourth session was instructed to support the adoption of two draft resolutions, one proposing a UN Field Service and the other, a UN Panel on Field Observers. On November 22, the General Assembly approved both resolutions.

Concerning implementation of the UN Headquarters Agreement of 1947, the Director of Controls of the Department of State recommended that the UN *laissez-passer* be recognized as a valid travel document, but not as a substitute for an American passport. U.S. visa problems with the United Nations were satisfactorily solved at a conference of the Department's Visa Division and the U.S. Mission to the United Nations. General Assembly Resolution 239 (III) urged members who had not done so to take legislative or other action to exempt their nationals employed by the United Nations from national income taxation with respect to their UN salaries and emoluments. The United Nations was informed that the Department had requested Congress to approve such exemption.

On December 1, 1949, the General Assembly adopted the "Essentials of Peace" resolution calling on every UN member to refrain from the use of force and, *inter alia*, to exercise discretion in the use of the veto in the Security Council, to settle international disputes by peaceful means, to attain international regulation of conventional armaments, and to agree on international control of atomic energy which would ban atomic weapons and assure the use of such energy for peaceful purposes.

The so-called five-power resolution, jointly sponsored by the United States and four other states, culminated from a Chinese resolution condemning Soviet violations of the Sino-Soviet treaty of August 14, 1945.

It provided, *inter alia*, that all states should "respect existing relations with China." On December 8, the General Assembly approved it and a related resolution.

In three 1949 memoranda, Ruth Bacon, Special Assistant to the Director of the Department's Office of Far Eastern Affairs, discussed the U.S. position in case of possible requests by the Chinese Communist regime for representation in the United Nations. In a position paper, the U.S. Delegation to the General Assembly recommended that the United States oppose any request by the Communists that they be heard in the General Assembly as representatives of the "Government of China" on the above-mentioned Nationalist charge.

The part of this volume dealing with the Western Hemisphere begins with documents related to discussions between the United States and Canada on political and economic matters, including adverse economic effects on a Canadian airline caused by delay in implementing the air transport agreements of June 9, 1949.

The documentary record on the American Republics is divided between multilateral and bilateral relations of the United States. At the Ninth International Conference of American States, held at Bogotá, March 30 to May 2, 1948, the United States signed the Charter of the OAS. Ratified on June 15, 1951 by President Truman, it entered into force for the United States on December 13, 1951. The United States, however, was unwilling to become a party to two other agreements signed at Bogotá: the American Treaty on Pacific Settlement (Pact of Bogotá) and the economic agreement of Bogotá. Furthermore, the United States did not participate in the American Committee on Dependent Territories, although it supported inter-American collective action for peaceful settlement of disputes, particularly in the Caribbean area.

After a listing of military agreements with seven of the American Republics, the remainder of the volume is devoted to documents concerning United States relations with fifteen American Republics. With the exception of five of the latter, the relations are of a political and economic nature. The record regarding El Salvador, Paraguay, and Venezuela is of a political nature only, while documents on Panama embody political as well as military matters. Relations with Guatemala concern all three fields—political, economic, and military.

The usual excellence of *Foreign Relations* is maintained in this volume.

JOHN MAKTO

Anuario de Derecho Internacional, I, 1974. Departamento de Derecho Internacional Público y Privado Facultad de Derecho, Universidad de Navarra. Pamplona: Ediciones Universidad de Navarra, S.A., 1975. Pp. xv, 718.

The law school of the University of Navarra, Pamplona, Spain, has recently published a yearbook of international law, containing a series of articles and notes of interest to international lawyers. In the continental

tradition, both private and public international law are included; this review covers only those parts of the *Anuario* which are concerned with public law.

This first yearbook contains four scholarly articles, and six notes, somewhat comparable to those found in law reviews in the United States. In addition, it has three other sections relating to international law: (1) Recent Events, (2) Recent Spanish Legislation, and (3) Spanish Jurisprudence. It also contains a section reviewing recent literature in the field and one of documents. Although most of the contributors are from Spanish institutions (26), there are one each from Argentina, Mexico, and Uruguay, and one law professor emeritus from Greece. Of the Spanish universities the four most represented are, in order, the Universities of Granada, Navarra, Barcelona, and Valencia.

Dr. Hector Gros Espiell, Ambassador from Uruguay, has a challenging article on GATT and the developing nations. There is a need, he says, for preferential economic treatment of the latter to achieve development, and this preferential treatment should be viewed not as a matter of grace or policy, but of legal obligation: It is "a consequence of an obligation, not conventional, but recognized by *opinio juris*" (p. 143, n. 32). Professor Enrique Pecourt García, who was the Director of the *Anuario*, writes on the lawmaking power of international organizations. The reader in the United States might ask, in view of some recent General Assembly resolutions, whether some kind of *Baker v. Carr* rule should exist internationally; in many of the international organizations today there is little relationship between voting power and population.

Professor José Antonio Corriente Córdoba writes on nationality and international law. His approach is theoretical and analytical. His apparent disagreement with the *Nottebohm* case (*Liechtenstein v. Guatemala*, ICJ, 1955) might not be accepted by the scholar trained in Anglo-American law, with its traditional emphasis on "connections" and *stare decisis*, although the latter point of view is not ignored by the author. The last of the four articles by Professor Algeria Borrás Rodríguez is on double taxation and the European Economic Community. His theme is that it is desirable to "harmonize" municipal legislation to avoid double taxation, and he points out that the Spanish fiscal structure differs substantially from that in the EEC states.

Dr. César Sepúlveda, the Mexican author, professor, and former law dean, contributes a note on the various agreements between Mexico and the United States concerning the legal aspects of contamination of international rivers. One of his ideas is similar to that advanced by Professor Joseph P. Chamberlain years ago: Solutions to legal-political problems are sometimes easier to reach when technical experts from each country deal directly with each other. In a note on the 1973 Argentine-Uruguayan Treaty on the Río de la Plata, Professor Ernesto J. Rey Caro provides a good background on international fluvial law, including material on customs waters and territorial waters. A note on the legal

aspects of the decolonization of Spanish Sahara, with a consideration of the claims of Mauritania and Morocco, is presented by Professor Eloy Ruiloba Santana. He suggested that the Mauritanian claim is probably better, but deplored the apparent lack of consideration of self-determination.

Professor Alberto Herrero de la Fuente reviews the Spanish-Soviet commercial accord of September 12, 1972, the first formal agreement between the two states since the severance of diplomatic relations April 1, 1939. The note has an interesting section tracing the relations between Russia and Spain from the thirteenth century to the Civil War of the 1930's.

A glimpse at treatymaking in modern Spain is provided in a note by Dr. José Antonio de Yturriaga Barberán, in which he discusses the Spanish Decree 801-1971. This was an attempt to systematize and centralize the treatymaking process in the foreign minister's office more than previously had been the case. The concluding note in the volume is a philosophical and theoretical treatment of the relationship between international and municipal law by Professor José Luis Iglesias Buige.

It is hoped that subsequent numbers of the *Anuario* will be available. This one presents a good overview of the thinking of continental-trained lawyers on a variety of legal problems. It will be useful to the international lawyer and to students of comparative law.

FREDERIC A. WEED

BRIEFER NOTICES

International Law Chiefly as Interpreted and Applied in Canada. By J.-G. Castel. (Toronto: Butterworths, 1976. 3rd edition. Pp. xxxi, 1268. Bibliography. Table of Cases. Index. \$40.00.) Having just reviewed a book about relatively recent Canadian-American political issues, I find the third edition of J.-G. Castel's casebook to be a potent reminder that legal literature can significantly broaden the range of issues covered in political studies and also add an important dimension to their analyses.

Not only Canadian legal perspectives are dealt with in Castel's casebook, which presents both traditional and newer aspects of international law. So are political perspectives, particularly in the extensive notes and comments about past and present Canadian positions in bilateral and multilateral negotiations about a variety of matters, including boundary disputes (now settled) with the United States, air pollution in the Detroit-Windsor and Port Huron-Sarnia areas, control of foreign investments, resource management, and remote sensing satellite surveys of earth resources. Indeed, even though focused essentially on official Canadian perspectives, the notes on such traditional matters as boundary waters and such newer complexities as remote sensing provide valuable glimpses of international law in the making both yesterday and today.

Appropriate attention is given to the important roles of the provinces, as owners within Canada of water and other resources, in the implementation of treaties and to the resultant need for federal-provincial agree-

ments on implementation and on passing along benefits. We are thus reminded, especially in regard to Canadian-American relations, that problems of law and legal obligation arise from the relatively autonomous activities of governmental agencies, subnational governmental units, and private persons. For example, Article III(7) of the Michigan Constitution authorizes the state, its political subdivisions, and "any governmental authority or any combination thereof" to enter into agreements with Canada or any of its political subdivisions. This implies that there are realms of transgovernmental law, as well as of transnational law, that warrant study by Americans as well as Canadians—realms extending deeper into political and legal relations than can be covered by so excellent a casebook as Castelf's.

WESLEY L. GOULD

Delimitation of International Boundaries. By Itamar Bernstein. (Tel Aviv: Imprimerie des presses de l'université, 1974. Pp. xxx, 291.) After World War I the Conference of Ambassadors and derivatively the Council of the League of Nations and the Permanent Court of International Justice were frequently involved in the settlement of boundaries, as in the *Paworżina*, *St. Naum*, and *Mosul* cases before the Court. In the work under review the author evinces concern lest this tendency towards third-party determination of boundaries might persist today to restrict the freedom of adjacent states to settle their boundaries without outside intervention or pressure. He is concerned at the pressure previously exerted by the UN General Assembly on Egypt and Libya to engage in delimitation negotiations and now on Israel to do the same with Egypt, Syria, Lebanon, and Jordan (pp. 114-20).

This position is argued as follows: (i) boundaries are not essential to the creation of a state (pp. xxvi and xxvii); (ii) in consequence, there is no obligation of delimitation, which can, indeed, be rejected (pp. xxv, xxix, 61, 118, 137, 167); (iii) delimitation can be validated only by the agreement of the adjacent states (pp. xxx, 239); (iv) rules of international law are therefore irrelevant for achieving delimitation (pp. xxix, 135, 167).

While recent events support the author's concern, the argumentation leads to contradictions. Freedom to refuse delimitation can ultimately justify UN pressures based on Chapters VI and VII of the Charter. Thus, the author is driven on pages 61 and 113 to concede what he rejects on pages 114-20. Although delimitation agreements are declared to be optional and free from constraints of international law or the international community, once executed, they acquire "general opposability and universal validity in international law" (p. 16). He responds to this apparent non-sequitur by arguing, the foregoing notwithstanding, that international law and the international community require stability and finality for boundaries (pp. xxvii-xxix) and by joining others in embracing the notion of "abstractness," declaring that "the rigid nature of the situation created engenders itself a normative regulation independent of the conventional process" (p. 167). Ignored is the widespread practice rejecting the *erga omnes* effect of delimitation agreements at least until Helsinki. To accept their "general opposability and universal validity in international law" would, for example, require recognizing the international validity of the boundary agreements making Poland and the Soviet Union contiguous in the Baltic area by obliterating Lithuania.

JOHN H. SPENCER

Constitutions of Dependencies and Special Sovereignities. Edited by Albert P. Blaustein and Eric B. Blaustein. (Dobbs Ferry, N.Y.: Oceana Publications, Inc. Volumes I-IV, 1975-1976 (looseleaf binders) \$69.) This collection of constitutional texts, decrees, and orders for more than sixty dependencies and "special sovereignties" (the editors fail to explain their use of this latter expression) is of more than passing interest to the international lawyer. It is a valuable complement to the excellent fourteen-volume series on *Constitutions of the Countries of the World*, edited by A. P. Blaustein and G. H. Flanz (Oceana, 1975). Assembling texts otherwise exceedingly difficult to locate and obtain, it is concerned with precisely those territories which, for more than a decade, have been the object of intense scrutiny and debate in the Fourth Committee and the Special Committee of Twenty-four¹ of the United Nations.

Invaluable as it is, the series, as published up to present, suffers from perplexing omissions. The critically important debates involving these territories at the United Nations,² have been almost totally ignored in the historical and bibliographical treatment of each relevant colony or dependency. Also in respect of the hotly contested issues concerning the multitude of small islands of the Caribbean and the Pacific, the bibliography fails to consider the contributions, among others, of Professors Sohn, Fisher, and Reisman. While texts relating to the remote French islands of Wallis and Futuna are available, there are none on New Caledonia, St. Pierre, and Miquelon. The "constitutions" of the Bantustans are provided but no documents on Namibia. American Samoa is covered, but not those islands which have been recently of so much interest to international lawyers: the Carolines, Marianas, and Marshalls.

JOHN H. SPENCER

Staatliche Informationspflichten im Seerecht. By Hartmut Schwarzkopf. (Berlin: Duncker & Humblot, 1975. Pp. 123. DM 36.) Historically maritime law abounds in obligations to notify or inform other states, or the public directly, of certain measures and facts. The author has made a comprehensive survey of these cases, beginning with the law in time of war (declaration of war, notification of blockades, prohibited zones, and mine fields). The obligation of ships to show their flag applies in peacetime as well, and the great interest in maritime traffic has brought with it international regulations for giving publicity to obstacles to navigation. More recently warning of pollution and nuclear dangers has become a duty. The consequences of negligence in fulfilling such obligations are discussed.

The author asks that these duties be taken seriously and that they be included as parts of general international law, in conformity with contemporary needs. He notes (p. 113 n. 2) many other branches of law where obligations to inform are stipulated. One begins to wonder whether there is not a general duty to inform constituting part of the law of co-existence. The UN Declaration of October 24, 1970¹ does not so require in speaking about cooperation, but the Helsinki Accords and the Single Negotiating Text (Part III, May 6, 1976) of the UN Conference on the Law of the Sea are rather explicit on this score. If and when these

¹ Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

² See the series of UN Docs. in A/AC.109 and UN Doc. A/8723.

¹ UN G.A. Res. 2625(XXV).

conferences produce concrete results, the book under review could be rewritten and perhaps extended to general obligations to inform.

Fritz MÜNCH

Grundgesetz und Völkerrecht. By Albert Bleckmann. (Berlin: Duncker & Humblot, 1975. Pp. 407. Index, DM 48.) The increasing direct impact of international, transnational, and treaty law on the private legal sphere requires a reappraisal of the hitherto accepted concept that a country's constitutional law is the ultimate source of its legal order. Professor Bleckmann's book on the relationship between constitutional and international law deals with this timely issue from the point of view of the Federal Republic of Germany the legal system of which raises especially interesting problems. The German Constitution gives force of law to the general rules of international law and authorizes the transfer of certain rights of sovereignty to supranational organizations. German law also provides strong guarantees of individual rights, protected by a quite effective system of judicial review. Therefore, differences between international law rules and German constitutional provisions may be resolved by a strictly judicial approach with a minimum of political and diplomatic accommodations.

The chapters of the book which deal with these problems are the most interesting ones. They are studied both from a theoretical point of view and in light of German court decisions. Some of the issues will be familiar to the American reader, such as conflicts between general international or treaty law and constitutional or other municipal legislation and the application of international law by national courts. Of special interest are the chapters which analyze the internal effect of the decisions of the organs of the European Economic Community and the influence of the European Convention on Human Rights. In addition, specific German problems are discussed, such as the internal distribution of the treaty-making power, limits of judicial review, rights of aliens and extradition, and the special situation of East Germany and Berlin.

One drawback of the book is that it was also designed to be used as a text for students who might not have previously studied international law. Accordingly, about half of the volume is dedicated to a general and highly theoretical explanation of the traditional fundamental concepts of international law, such as sovereignty, territory, nationality, and the sources and subjects of international law. The more advanced reader may do well to skip these parts and concentrate on the chapters dealing with the specific subject matter of the book which he will find to be very rewarding.

MICHAEL A. SCHWIND

Die Völkerrechtssubjektivität der Unionsrepubliken der UdSSR. By Henn-Jüri Uibopuu. (Vienna and New York: Springer-Verlag, 1975. Pp. xv, 341. DM 118.) The question of the international legal personality of the Union Republics of the USSR has long been the object of scholarly attention, attracted by the obvious paradox between the official claim that these entities possessed the requisite juridical capacity to act as fully acknowledged members of the world community and the Soviet Union's well established de facto reputation as one of the most centralized, unitary political organisms in existence. This anomalous situation has taxed the ingenuity of a long queue of Soviet glossators attempting to square the contradictory evidence through dialectical artifice, while Western students of the problem have generally taken a rather skeptical view of

these efforts to invest the component republics with some kind of sovereign status.

Still, the debate goes on and this latest contribution to the library shelves by Dr. Uibopuu is an able summary and analysis of virtually everything that has been said and written on the subject to date. The volume is an exhaustive and sure-footed exploration of every aspect of the juridical environment that bears on the topic of the extent to which the individual Soviet republics can adopt "supreme" decisions on their own, how much self-contained jurisdiction and competence they enjoy to distinguish them from the USSR proper and allow them to play a "separate" role. The documentation is thorough, the tone is fair, the critique is even-handed. The emphasis, however, except for the brief section dealing with international organizations and treaties, is primarily theoretical, with the author concentrating on the pertinent international and constitutional law doctrines and the framework of constitutional and administrative norms which define the position of the republics within the context of the USSR. The focus, in short, is on the formal structure and distribution of respective powers and duties instead of on the manner of their use and application. The paper record receives its best treatment yet in Western legal literature, but the far more interesting and important intimate details of plain practice unfortunately remain an uncharted terrain, although it is at the routine level of how these grandiose putative rights are exercised and effectively manage to express themselves that meaningful conclusions about the Soviet experience emerge rather than on the plane of abstract jurisprudential formulations.

GEORGE GINSBURGS

La France et le Droit de la Mer. By the Centre National de la Recherche Scientifique. Presentations by A. Piquemal, A. Bernes, M. Savini, G. Ringear, Y. Souliotis, A. Leonetti, J. P. Queneudec. (Nice: Université de Nice, 1975. Pp. v, 232.) In Europe France has a coastline of some 3,000 kilometers washed by four seas. Around the world this once imperial power governed by Paris still has possessions in the Atlantic, the Pacific, the Caribbean, the Gulf of Aden, and the Antarctic. Thus, any new regime for the oceans and seabed would greatly affect French interests. In this volume six scholars, under the direction of René-Jean Dupuy at the National Center for Scientific Research, have carefully examined French marine policy, especially to assist the work of the French delegation before the opening of the Caracas session of the UN Third Law of the Sea Conference in 1974.

The first substantive part of the work deals with the delimitation of ocean space and contains two papers, one by Alain Piquemal on the French position with respect to the seabed beyond national jurisdiction, another by Annick Bernes on ocean space under national jurisdiction. The second part of the work contains a study by Michel Savini on the international law of fisheries and France and another by Gisèle Ringear on scientific research in the oceans. The third major part of the work encompasses three papers on the defense of the ocean environment, including an examination of the French position on disarming the seabed by Yannis Souliotis, a paper by Antoine Leonetti on ocean pollution, and finally a synthesis of French policy with regard to the law of the sea by Jean-Pierre Queneudec.

Although the meetings of the UN Third Law of the Sea Conference at Caracas, Geneva, and New York have come and gone, this study is still

timely, rich with detail about French statutes and international conventions, French participation in the seabed committee, the fishing stocks exploited by France, the French navy, and French agencies and actions to combat ocean pollution. For all interested in the progress of the law of the sea, nothing could present a better overview of French policy.

GERARD J. MANGONE

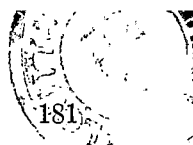
Die Sich Ändernde Bedeutung der Feindstaaten-artikel (Artikel 53 und 107 der Satzung der Vereinten Nationen) für Deutschland. By Werner Trützschler von Falkenstein. (Bern: Herbert Lang; Frankfurt: Peter Lang, 1975. Pp. 160. Sw.Fr. 26.40.) In his scholarly study von Falkenstein examines an aspect of the UN Charter which has been almost forgotten, the reference to "enemy states" in Articles 53 and 107. These provisions touch the sensibilities of the Germans, and probably of the Japanese and Italians. When the Charter was signed, the war was concluded in Europe but not in the Pacific. The major powers at Dumbarton Oaks insisted that two special provisions be inserted which permitted the United States, Great Britain, France, and the Soviet Union, still engaged in hostilities, to proceed without consulting the UN Security Council in enforcement action concerning enemy states. Article 107 went one step further by declaring that "nothing in the present Charter" should obstruct any action against "enemy states during the Second World War."

Von Falkenstein's analysis dissects and discusses the historical and legal aspects of problems arising from these articles. A substantial part of the book is devoted to different opinions concerning the existence of the German Reich, or the concept of "Deutschland als Ganzes" (all German existence). German scholars of international law have long debated the proposition of the continuity of Germany. While nearly all agree that *debellatio* has taken place, most contend that Germany continued to exist. A few argue that Germany as a subject of international law has disappeared. A historical approach might hold that Germany survived by an act of the victors who decided not to annex Germany after *debellatio*, since they did not have the animus to destroy the defeated state completely.

Von Falkenstein argues that if Germany has disappeared, "enemy state" provisions would not apply. However, if Germany continued to exist, it would be subject to special intervention or use of force. Moreover, once an "enemy state" was admitted to the United Nations, it would no longer be subject to special treatment. To eliminate even potential action, he recommends the elimination of references to "enemy states." After examining the political situation in the United Nations, he concludes that, while desirable, such an amendment would have low priority for most nations. It is not likely, therefore, to be acted upon in case of Charter review. The book is well conceived and has, in addition to well-known scholars, a number of references to German writers. It is a valuable indication of growing interest in the legal aspects of the UN Charter by European, particularly German, scholars.

FRANZ B. GROSS

UN-General Assembly Resolutions. A selection of the most important resolutions during the period 1949 through 1974 (session I-XXVIII). Checked and compiled by Knud Krakau, Henning v. Wedel, Andreas Göhmann. (Frankfurt am Main: Alfred Metzner Verlag, 1975. Pp. xiii, 442. Index.) This volume contains the text of or excerpts from 338 out



of a total of more than 3000 General Assembly resolutions.¹ It begins appropriately enough with Resolution 1(I) of January 24, 1946, which placed "the problems raised by the discovery of atomic energy" on the agenda of the Assembly and ends with Resolutions 3201 and 3202(S-VI) of May 1, 1974, on the establishment of a new economic order. Also included is the text of the 1963 Test Ban Treaty and Resolution 45(III) of UNCTAD entitled "Charter of Economic Rights and Duties of States." The resolutions are grouped under substantive headings such as "UN-Internal Problems." There is also a numerical list of resolutions including their official numbers, a list of conventions and declarations, as well as a copious topical index. Regrettably the subtitle indicates the beginning of the period covered as 1949 instead of 1946.

The selection is based on two criteria: to include first resolutions "which are particularly relevant for the evolution (or maybe even revolution) of modern international law" (vi), and second, resolutions which indicate "tendencies and developments which have not yet found final (legal or other) expression in a convention, declaration, etc. but which appear most important and relevant in our precarious world" (*id.*). The result is a very useful, handy, and easily available volume which every student of the United Nations will want to have on his shelf.

LEO GROSS

Doppelte Loyalität. Ein Problem für die zur Europäischen Gemeinschaft entsandten Beamten der Mitgliedstaaten. By Horst Herzog. (Berlin: Verlag Duncker & Humblot, 1975. Schriften zum Völkerrecht, Band 47. Pp. 102. Bibliography. DM 29,80.) The book under review is a further and important contribution to the theory of international organization and to the problem of multiple loyalties of its officials. In his thesis, Herzog has examined especially the legal, administrative, and the sociological implications of seconding employment of national civil servants to the organs of the EEC and mainly to the official services of the Commission. Thus the book is a complement to the previous works of Basdevant (1931), Guetzkow (1955), Bedjaoui (1958), Coombes (1968), and Ruzié (1970).

The study opens with a discussion of the different national systems of public appointment in the nine member states (Part I) and compares them to the legal status of the European officials governed by the Statute of Service of the European Communities (Part II). Part III reviews the diverse state practices of secondment and comes to the conclusion that "double loyalty" arises necessarily from the defective legal construction and the present practice of delegation by the national authorities.

After this "prelude," Part IV focuses on a typology of special manifestations of double loyalty which could possibly emerge from the service in the European functional sphere. This is one of the most interesting chapters of Herzog's study, although it lacks convincing evidence for a concrete case of conflict because many of Herzog's conclusions are based more on abstract reflections than on the empirical material.

Lastly and in Part V the author deals with a wide variety of approaches to conflict settlement and proves hereby the scholarly qualities of his study. The main emphasis is on the revision and the harmonization of the legal construction of secondment by the member states, which jeop-

¹ For a review of the first volume of a complete collection published under the title UNITED NATIONS RESOLUTIONS, Series I, compiled and edited by Dusan J. Djonovich, see 68 AJIL 174-75 (1974).

ardizes the effectiveness of the principle of Community loyalty, laid down in Article 11, paragraph 1, of the Statute of Service.

In sum, Herzog's thesis will certainly be welcome to all scholarly readers because of its clear structure, its lucid and coherent analysis, and its compilation of materials regarding especially the civil service of the EEC. The usefulness of this book is enhanced by the inclusion of a complete bibliography concerning multiple loyalties in international organizations in general.

THOMAS M. LÄUFER

La Commission des Droits de l'Homme de l'O.N.U. By Jean-Bernard Marie. (Paris: Editions A. Pedone, 1975. Pp. xii, 352. Index. F.70.) If the work of the UN Commission on Human Rights has not totally fulfilled the hopes of its proponents and supporters, neither has it been as ineffectual as its original opponents might have hoped. In this overview of the work of the Commission since its inception, the author describes the evolution of the Commission from a small group with limited jurisdiction and little authority to a larger committee vitally involved in the many facets of protecting and promoting human rights.

This is the first publication devoted exclusively to the UN Human Rights Commission and it is an important contribution to the growing body of literature on the international protection of human rights. For those unfamiliar with the work of the United Nations, the book explains the origin of the Commission, its structure and functions, and its place in the UN organization. In addition, the jurisdiction and procedures of the Commission are described in a way useful to those teaching and practicing in the human rights field.

In many ways it is an optimistic book; the progress of the Commission towards becoming an effective organ for the protection of human rights is apparent, yet the difficulties are not understated. In particular they can be seen in the disparity between positions taken by the Commission, the members of which sit as government representatives, and those of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, the members of which are appointed as independent experts. Yet, in spite of these difficulties, the Commission has evolved in thirty years from an organ whose very creation was opposed to one which in 1975 considered situations based on over 63,500 communications alleging violations of human rights. One problem with the book is that the evolution it describes continues, rendering it already out of date. It covers the work of the Commission until 1974. Since then there have been developments which need to be included in a revised edition. These developments might conveniently be incorporated in an English translation of the work.

The subject will interest those involved in international law in general and human rights in particular. Only those very familiar with the field may find the book not fully satisfactory; it is a general survey and as such descriptive rather than analytical. The first part of the book appears to be primarily taken from official UN records, without the addition of explanatory or background material. It is clear that much remains to be written about the Commission. This book is a good and necessary beginning.

DINAH SHELTON

Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights. Vol. I: Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly, 11 May-8 September 1949. (Pp. xxxiii, 327.) Vol. II: Consultative Assembly, Second Session of the Committee of Ministers, Standing Committee of the Assembly, 10 August-18 November 1949. (Pp. xiii, 311.) (The Hague: Martinus Nijhoff, 1975. Indexes. Gld. 120 each.) Volumes I and II of this edition of the *Travaux Préparatoires* focus principally upon the work of the Consultative Assembly of the Council of Europe in August and September 1949. The text, in English and French, makes the deliberations of this body in the production of a draft European Convention on Human Rights and a draft Statute of the European Court on Human Rights widely available for the first time. The transcript of the early considerations and discussion on these drafts provides an excellent source of legislative history for the student of modern European organization.

Of particular interest to the reader are the debates surrounding the two major topics of discussion: the list of human rights the Assembly sought to guarantee and the creation of the machinery for the collective guarantee of those human rights. Three major obstacles to agreement emerge from the text: (1) Should so-called "social rights" (e.g. right to work, right to own property) be included in the draft Convention? (2) Should the enforcement mechanism be through petition to the Council only, to a human rights commission, or to a European court? (3) Should access to the enforcement mechanism be granted to citizens of signatory states? The resolution of these questions as it unfolds in the text is both illuminating and replete with the unparalleled eloquence of the best minds of Europe.

BRUCE M. BOTELHO

Uso de la Fuerza por los Estados. Interacción entre Política y Derecho: Algunos Problemas. By Alejandro J. Rodríguez Carrión. (Malaga: Organización Sindical, 1974. Pp. xxiv, 382.) In this book on the "Use of Force by the States. Interaction between Politics and Law: Some Problems," Dr. Rodríguez Carrión divides the subject matter into four main chapters: I. The prohibition of recourse to force; traditional international law; the League of Nations; UN Charter, Article 2, paragraph 4, and Article 51; II. Use of force and the right to political independence of the state; politics and law; intervention; theory of limited sovereignty; socialist practice and Western practice; politics of *status quo*; III. The use of force and the territorial integrity of state; self-defense of state territory; IV. Use of force and protection of the individual and of economic interest; defense of the individual; protection of nationals; protection of human rights; nationalization and intervention.

This book is difficult to understand but easy to read, as stated by the distinguished Professor Juan Carrillo Salcedo in an introduction to the book. In several parts, the author analyzes the meaning or scope of different provisions of the UN Charter, especially those dealing with collective security. In some passages the author seems pessimistic about the effectiveness of the United Nations in the political field. On the question of self-defense of the territory of the state, for example, he asserts (p. 192) that the right of self-defense under Article 51 of the UN Charter has a changeable content depending on the degree of development of each juridical system, and that there is a lack of precision in the principle. He concludes (p. 193) that Article 51 of the UN Charter has become obsolete.

The author is not very much concerned with regional systems of collective security. He refers briefly to NATO, SEATO, and also to the inter-American collective security system as established by the Inter-American Treaty of Reciprocal Assistance, the so-called Rio Treaty. As the book is not exclusively concerned with the provisions of the UN Charter on this matter, the author could have examined the regional security systems in more detail. It is well to keep in mind, for instance, that the inter-American regional security system has been very effective and NATO and other regional arrangements have been quite useful in the maintenance of international peace and security.

ISIDORO ZANOTTI

Der Vertrag über die gegenseitigen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik vom 11. Dezember 1973—Eine völkerrechtliche Analyse. By Matthias Weigand. (Bern: Herbert Lang; Frankfurt: Peter Lang, 1975. Pp. 127. Sw. Fr. 26.40.) This brief treatise, written originally as a dissertation, offers an outline survey of the 1973 Treaty on Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic. The author focuses on selected issues of international legal interest and generally avoids a contextual discussion of the political and ideological disputes between the parties.

In part one the author examines the major obstacle to the conclusion of the 1973 treaty and the central problem during negotiations, namely the question of the international legal status of the 1938 German-Czechoslovak border settlement. Readers are given a review of the varying viewpoints and negotiating positions concerning the 1973 treaty, which provided a solution to that question. Part two is an examination of the 1973 treaty as a *Rechtsfigur*, as well as a discussion of the relevant German-Czechoslovak correspondence. The third and final part is a study of the concrete contents of the treaty, of the results achieved, and of the necessary conclusions to be drawn. The author sees the 1973 German-Czechoslovak treaty as the natural outcome of the series of agreements the Federal Republic has concluded with the Soviet Union, Poland, and East Germany. The entire effort has been based upon the drive for normalization and mutual security in Europe. The author safely concludes that the fate of the treaty depends upon the willingness of the parties to fulfill its provisions. The German and Czech texts of the treaty, along with related correspondence, appear in an appendix.

FOREST L. GRIEVES

International Terrorism. National, Regional, and Global Perspectives. Edited by Yonah Alexander. (New York, Washington, and London: Praeger Publications, 1976. Pp. xx, 390. Index.) This work edited by Yonah Alexander of the State University of New York at Oneonta is essentially an indictment of methods of guerrilla warfare or terrorism, terms which are used interchangeably in the contributions of several of the eleven authors. The essays are arranged under five headings: North and South America; Europe and the Soviet Union; Asia and Africa; the Middle East; and the United Nations. Arthur Goldberg has written a brief introduction which sums up the thrust of most of the contributions that "although acts of individual and collective terrorism committed in the name of supposedly 'higher' ideological and political principles date from time immemorial, the world has been plagued during the past decade by an alarming and unprecedented expansion of such phenomena."

Certain essays like those by L. C. Green and J. Bowyer Bell contain useful perspectives of experts from countries other than the United States. Most of the other contributions reflect the official U.S. Government point of view, with certain variations. Some of the authors take pains specifically to condemn the Arab variant of guerrilla warfare and Soviet support. Terrorism in the United States is dismissed as insignificant and miniscule. Green attributes to the Canadian Government a certain impatience with attempts to prevent "real concrete progress" by injecting political ideology. Bell tells us that in the Irish case the whole area of guerrilla-terrorist strategy and tactics is saturated with political rhetoric. Seymour Maxwell Finger concludes in his chapter on terrorism and the United Nations that the word terrorism is "politically loaded," a comment with which one can hardly disagree after perusing certain emotional condemnations throughout this book.

It is curious that regardless of the well-nigh overwhelmingly antiterrorist tone, especially in the essays dealing with the Middle East, terrorism still remains an issue, with the causes unsolved and consensus in the international community lacking. If words could kill, Yonah Alexander has attacked terrorism with such bitterness and rancor that little support for the kinds of activities it denotes should remain after an even superficial reading. But that is, of course, not the case. It seems that solutions to the problems these essays cover in outline form will await a more effective linkage of terrorism to its causes as called for by the United Nations. In the meantime, the subject of hostages which is not touched on in any depth in this work surprisingly enough is likely to displace, temporarily at least, the current focus on terrorism with "terrorism-related" issues.

ROBERT K. WOETZEL

Transnational Terror. By J. Bowyer Bell. (Washington: American Enterprise Institute for Public Policy Research; Stanford: Hoover Institution on War, Revolution and Peace. 1975. Pp. 91. \$3.00.) This short volume provides a useful introduction to more extensive investigation into the diverse aspects of terrorism. The analytical framework identifies the socio-political orientation of various terrorist motivations and provides examples. The author acknowledges localized terrorism derived from such motivations as tribalism, vigilantism, and individual psychosis. He then turns to his primary concern, analysis of six types of transnational terrorism as products of revolutionary violence.

One chapter is devoted to practitioners of revolutionary violence. The author finds evidence of a comprehensive strategy by terrorists but sees no coherent or sustained worldwide conspiracy. He concludes that co-operation between terrorist groups is an ad hoc kinship of frustrations and compatibility of methods, not a coalescence of organizations. The final part of the book analyzes American responses to transnational terrorism and discusses options for future U.S. policies. The author suggests that outrage is an ineffective deterrent policy in the "face of an ever escalating cycle of spectacular transnational terrorist dramas." He recommends a combination of policies to neutralize the efficacy of terrorism: support for antiterrorism multilateral conventions and bilateral treaties, development of technological countermeasures, and pursuit of governmental programs designed to reduce the socio-political frustrations which spawn terrorism. Brevity precludes treatment of such topics as the possible use of nuclear blackmail by terrorists or terrorist exploitation of

communications media such as television. The incisive treatment the author provides concerning conventional aspects of transnational terrorism may make readers wish that he had included his perceptions on these more innovative and sophisticated recent developments.

CHARLES WILLARD GOMON

The Arctic in Question. Edited by E. J. Dosman. (Toronto: Oxford University Press, 1976. Pp. 206. Index. \$4.95.) The 1968 oil discoveries at Prudhoe Bay signified the beginning of the economic era of the Arctic Basin, and with it came a realization that our knowledge of the area could not cope with the legal, political, technical, and environmental problems that arose. The post-1968 years witnessed a proliferation of publications dealing with individual problems but, with a few exceptions, they did not offer an overall assessment of the situation. Now, Mr. Dosman and his associates have produced a much needed compilation of factors that influence Arctic problems seen from the Canadian point of view. We are presented with clear and concise data on pre-1968 Canadian activities, the construction of the DEW Line, the legal and political maneuvers of the *Manhattan* voyage, and the strategic and technical aspects of the Canadian Arctic. Furthermore, we are made aware of the mood of the Canadian people in regard to the developments taking place in the northern regions. This mood is characterized by an awareness of the importance of the area and an intense desire to safeguard it from foreign intruders by establishing Canadian sovereignty. Interestingly enough, the greatest perceived threat does not come from the Soviet Union, but from the United States. In this respect the authors strongly suggest that Canada's policies up to the present have been too uncertain, minimizing Canada's legal rights and allowing the United States to acquire the advantage in matters such as passage through the Canadian Archipelago and the Pollution Prevention Act. However, their treatment of the problem of passage is not satisfactory. They argue that the extension to 12 miles of the Canadian territorial waters had the effect of creating "gateways" to the Archipelago through which Canada could "legally control access to the waters." This does not take into account the subtleties of the principle of innocent passage which would preclude the coastal state from "controlling" navigation. A similar error is made in the archipelagic approach when the authors do not consider the probability that marine law will safeguard the rights of passage through recently enclosed internal or archipelagic waters. Furthermore, the chances are that neighboring states will receive preferential rights.

The authors have succeeded in identifying major problems but they have not analyzed all the governing factors sufficiently. Considering the magnitude of the subject and the complexities of the Arctic this book is a most useful contribution. It presents, however, only the tip of the iceberg.

VALENTIN LIVADA

Micronesia: Trust Betrayed. Altruism vs. Self Interest in American Foreign Policy. By Donald F. McHenry. (New York and Washington: Carnegie Endowment for International Peace, 1975. Pp. xiii, 260. Index. \$10, cloth; \$4.95, paper.) The Trust Territory of the Pacific Islands, the unique example of a strategic area trusteeship, has from the outset of American speculation as to the postwar future of Micronesia been a source of domestic confusion and conflict for the United States. In this book Donald F. McHenry has devoted major attention to the governmental controversies which have characterized American concern with the islands,

and to the issues of status, particularly for the Marianas, which have marked the more recent phases of the trust relationship. An interesting feature of the book is its examination of the effect of these proposals and negotiations on the existing American dependencies.

It is an arguable proposition that there is a basic contradiction, inviting "betrayal," contained within the concept of strategic area trusteeships. As laid out in the Charter, trusteeship involves the promotion under international supervision of the well-being and development of the people of the territory toward self-government or independence. In a strategic area, on the other hand, the primary concern of the trustee is the maintenance of control over the land (a basic resource in short supply in Micronesia) and the facilities necessary for military installations and activities. If this were not the case, the territory would presumably not have been designated a strategic area. Furthermore, the American veto in the UN Security Council was available to block international supervision. Although the United States did not make across-the-board use of all the safeguards which the strategic area status of Micronesia provided it, they proved useful when and wherever the United States found them essential to its military needs.

The issues which occupy the bulk of McHenry's attention are only in rare instances derived from established rules or principles of international law. They exist rather in that extensive and growing twilight zone between established international law and the rules and principles laid down unanimously or by overwhelming majorities in the United Nations. As far as Micronesia is currently concerned, the most significant element is the body of doctrine designed to speed and universalize the sweep toward decolonization: self-determination as the chosen instrument to win independence without disruption of "national unity and territorial integrity."

Micronesia: Trust Betrayed is the first full length book to come from the Carnegie Endowment's Humanitarian Policy Studies Program. A distinctive feature of the Program is that it enlists the collaboration of young people, for the most part graduate students. In gathering material for this volume an intensive interviewing program supplemented the usual documentary sources.

RUPERT EMERSON

Chile: The Balanced View. By Francisco Orrego Vicuña. (Santiago: University of Chile Institute of International Studies, 1975. Pp. 298.) Whether *Chile: The Balanced View* is seen as a correctly descriptive title of Dr. Orrego Vicuña's selection of readings will depend a great deal on the preconceptions of the reader. It is a group of readings, including a selection from one of William F. Buckley's PBS interviews, by a wide variety of authors, all of whom have one thing in common: a point of view which is defensive of, or at least favorable to, the present post-Allende regime in Chile. For this reason the book can be called one-sided which does not, however, mean that it should be ignored.

The authors are in one way or another qualified to write about the Chilean situation. Among them are scholars such as Dr. Orrego Vicuña from Chile, a representative from the International Monetary Fund, British observers, U.S. professors with expertise in some phase of Latin American affairs, and writers from such organizations as the Brookings Institution, the Center for Strategic and International Studies at Georgetown University, the Hoover Institution at Stanford University, and the Congressional Research Service of the Library of Congress.

The intensity of the anti-Allende writings varies with the different author's political or economic orientations, but there are some common themes. The principal shortcomings ascribed to Allende are illegality of actions when in office, the extension of hospitality to foreign terrorists and some criminal elements, the illegal importation of arms from states sympathetic to his cause, and a whole series of economic policies which left Chile without international credit worthiness and a domestic inflation rate varying from a "low" of 350% all the way up to 1500%. Although the book is slanted, it contains a good deal of sound scholarship, particularly in Dr. Orrego Vicuña's own article (reprinted from 67 AJIL 11(1973)), which is concerned with the international legal question of compensation when there is expropriation and nationalization of alien-owned property—in this case copper enterprises.

On some university campuses in the United States, speakers who have tried to defend the post-Allende regime have been shouted down by those who so intensely favored the "Allende earthquake" that they were unable to tolerate the expression of a contrary point of view. Since the self-appointed censors have not moved to book burning, it is recommended that libraries acquire the book. It will be useful both to the international lawyer and the Latin American specialist.

FREDERIC A. WEED

International and Interstate Conflict of Laws. Cases and Materials. By E. I. Sykes and M. C. Pryles. (Sydney, Melbourne, and Brisbane: Butterworths, 1975. Pp. xxix, 914.) The new Australian case book on conflict of laws is the result of a joint effort of Edward I. Sykes, Professor of Public Law at the University of Melbourne, and Michael C. Pryles, Senior Lecturer in Law at Monash University, holder of a post-graduate degree from an American Law School. The collection has the controlling English and Australian decisions and also a considerable amount of material from the United States, primarily but not exclusively for the part on constitutional conflicts where the material is relevant because of the affinities between the constitutions of the two federal systems.

Recent doctrinal development, especially in the common law world, is given due attention. The collection has a strong chapter with materials on theory and method for discussion of choice of law. Proper space has been given to conflicts history, which cannot be said of all domestic collections. Matrimonial law is not covered in the collection which, except for that, has broad coverage. Legislation was pending before the Parliament and expected to affect matrimonial law in its entirety. The Family Law Act, 1975 was passed soon thereafter.¹

For an American conflicts teacher this unparochial case book has many attractions. Up to date English and Australian materials are at one place. For interstate problems the book makes comparisons between the domestic and Australian federal systems easy.

In the preface, the membership of Australia in the Hague Conference on Private International Law is given as an additional reason for paying attention to international, as well as interstate conflict of laws. In this respect, material shedding light on a difficulty encountered at recent international conferences in relations between the federal systems would have been of interest. The Australian Constitution has nothing in writ-

¹Materials are collected in MICHAEL PRYLES, *CONFLICTS IN MATRIMONIAL LAW: CASES AND TEXT*. Butterworths, 1975. Pp. xii, 148.

ing on the treaty-making power and the tradition has been to argue it from the "external affairs" clause, although today a "direct" approach seems to be preferred by some. The traditional approach leads to a look at a distribution of powers between federation and states different from that in the United States and Canada. In treaties to which federal systems are a party, often a clause is needed clarifying whether a reference is to federal or state law. On several occasions efforts to find language acceptable to the three federal systems were unsuccessful.

KURT H. NADELMANN

The Law of Diplomatic Relations. Volume I: Introduction, The Diplomatic Mission. (In Greek.) By Basile N. Papacostas. (Athens, 1976. Pp. 98.) In this first volume, the sweeping title is limited to the subject shown in the subtitle. Professor Papacostas contemplates a "second part of this work." Having published a book on *The Immunity from Jurisdiction of Diplomatic Agents*, he wanted to expand it and give the whole picture of the law of diplomatic relations. His object is to deal with the rules of law that govern diplomacy which he defines as the totality of rules of law, means, and methods that allow a state to exercise functions in the international field for the promotion of its interests by peaceful means. He hastens to observe, however, that a mere exposition of such rules would be dogmatic if it were not accompanied by a study of the causes that led to their formulation.

The historical development of diplomacy is attributed to economic and social changes that take place within a state. According to the author, this is shown by an examination of the more significant periods of diplomacy. And so he traces its development from antiquity to the present. He begins by describing Greek and Roman practices, moves to a second period—the Middle Ages—then to a more recent era, and concludes with the contemporary epoch. International custom and treaties are given as two sources of diplomatic relations. The 1961 Vienna Convention on Diplomatic Relations (the Greek text of which is given in an Annex) is characterized as codification of the law of diplomatic relations. After a discussion of the exchange of diplomatic missions, this little treatise concludes with an analysis of the organization and personnel of such missions. Students of international law will find this work a useful contribution to its topic.

JOHN MAKTO

The Symposium on Law and Population: Proceedings, Background Papers and Recommendations. (Published by United Nations Fund for Population Activities. 1975. Pp. 309.) This volume is the transcribed proceedings and recommendations of a symposium on law and population which convened in Tunis, June 21–24, 1974, under the principal sponsorship of the United Nations and the UN Fund for Population Activities (UNFPA). It represents a laudable effort by over 100 participating experts (enumerated in the Appendices) in medicine, law, and the behavioral sciences from 50 nations to analyze the physical, socio-economic, and legal-political aspects of population activities and to assess the impact of population policies upon local, state, and international levels. While not reflecting the official views of any particular national government or UN agency, this compilation clearly reveals the direction of municipal population planning and ways in which the international community is involved in charting that course.

Five substantive parts comprise this work: the socio-economic effects of population; the legal aspects of reproduction vis-à-vis the family; the need to coordinate population laws and policies; the selected reports from several workshops held on specific population problems; and a series of detailed action recommendations consistent with the spirit of UN human rights instruments, World Population Year (1974), and International Women's Year (1975). One article on local government participation in population activities by Reuben B. Canoy, Mayor of a Philippino city, provides a reasonably detailed administrative analysis of that city's model project on population planning. In comparison, "Population in the UN System: Developing the Legal Capacity and Programs of UN Agencies" by Daniel G. Partan essentially summarizes the Boston University Law Professor's larger study of 1972 which surveys the multiple population functions and activities of UN agencies. As highlighted by these two contributions, the merit of these proceedings rests in the interdependence of municipal and global population planning activities and in relating them to reasonable and desirable objectives which can be, and in some cases have already begun to be, implemented on the grassroots level. Hence, the proceedings, while a noteworthy contribution to the increasing raft of population literature, should be especially valuable for a section on policy recommendations. Accordingly, it will be of particular interest to socio-economic planners, as well as policy implementers in the field of population on the level of municipal and international law.

NANCY D. JOYNER

A Collection of International Concessions and Related Instruments. Vol. I. Edited and annotated by Peter Fischer. (Dobbs Ferry: Oceana Publications, Inc. Pp. xxv, 510. \$40.00.) This volume (covering the period 595-1229 A.D.) is the first of a collection of instruments documenting transactions between sovereigns and foreign private persons. It was a wise decision to issue these separately and to exclude them from Clive Parry's *Consolidated Treaty Series* (which was restricted to agreements between states). The editor (who teaches at the University of Vienna), defines a concession as "a synallagmatic act by which a State transfers the exercise of rights or functions proper to itself to a foreign private person which, in turn, participates in the performance of public functions and thus gains a privileged position vis-à-vis other private law subjects within the jurisdiction of the State concerned" (p. xviii). Later volumes, where petroleum, postal, and public utility concessions will be prominent, will be of greater interest to international lawyers today. The medieval charters in the present volume in many cases seem to be merely deeds transferring land, or grants by the pope of ecclesiastical privileges. Similarly the precept of Henry II of England authorizing the citizens of Cologne to sell wine is addressed to his judges and public ministers (p. 163), much in the fashion of Magna Carta, chapter 41 of which protects merchants. Exemptions from taxation, from judicial process, and sometimes the grant of authority to hold court and administer justice (what Maitland would call a "franchise" or regality conceded by the sovereign) are topics frequently dealt with in these charters. Some of the concessions, however, resemble modern commercial treaties, except that the commitment of the host state is made directly to the traders involved rather than to their sovereign. Thus many instruments relate to privileges to be enjoyed by the merchants of Venice (pp. 115, 141, 225, 435) or other traders. Many other grants are to knightly orders, such as the Templars, and give rights in territory to be recovered from heathen or infidels.

Thanks to modern typographical technology, the passages included are reproduced directly from the volumes from which they are extracted (mostly in Latin, with occasional texts in German, Spanish, or Russian). Each item is introduced by an editorial note indicating the source used, identifying other available sources, and providing a brief synopsis of the document. The series should be very useful, especially when it has progressed to later periods of time and documents of current interest, similar to those occasionally published in *International Legal Materials*, are gathered into a systematic and comprehensive collection.

EDWARD DUMBAULD

Selected Judgments of the Supreme Court of Israel. Special Volume. Edited by Asher Felix Landau and Peter Elman. (Jerusalem: Ministry of Justice; Dobbs Ferry: Oceana Publications Inc., 1975. Pp. viii, 191. \$17.50.) This special volume of the Israel Law Reports contains two judgments of the Supreme Court sitting as the High Court of Justice—*Rufeisen* (1962) and *Shalit* (1969)—each dealing with the problem of nationality and, in Israel, the politically controversial issue of the definition of "Jew." While at first sight the latter question might appear to be of purely internal concern, it is in fact one of international interest too, for, if it is held that Israeli nationality is tied in with attachment to the faith, it could well mean that a person regarded by himself and the world as an Israeli is in fact stateless. The conflict and its implications are illustrated by the 1962 decision when it was held that while under religious law a converted Jew remains a Jew, this is not so in the Law of Return or the Registration of Inhabitants Ordinance, for both of which the term "Jew" has the secular national meaning attributed to it in common parlance. As a result "Brother Daniel," although still a Jew according to religious law was not considered such by state law and, having renounced his Polish nationality before leaving Poland for Israel, was "a man without nationality." While the court denied that Israel was a theocratic state, it emphasized that from the point of view of nationality it was the Law of Return and the ordinary understanding of the nature of Israel as a Jewish homeland that governed the case and denied the application.

Shalit was more complex in that it concerned the status of children born in Israel to a Jewish father and a non-Jewish mother. According to religious law they could not be Jews, but their father wished them registered as of Jewish or Hebrew nationality without indicating any religion. On this occasion the majority of judges supported the applicant, with one going so far as to point out that the religious law did not tally with the real situation existing in Israel today. They also held that the issue of Jewishness did not really arise in this case, since it was concerned with details for the Population Registry, and the majority upheld the right of the registrant to decide what should be recorded, while tending to support the view that the term "nation" should be interpreted in accordance with modern secular notions.

From the point of view of international law the importance of the decisions lies in illustrating the difficulties with which a state like Israel is faced, with the possibility that, should circumstances so demand, application of the religious test may well result in statelessness, even though one of the purposes of the Law of Return is to provide a home and a nationality for many who would otherwise have been stateless.

L. C. GREEN

The Year Book of World Affairs, 1976. Vol. 30. George W. Keeton and Georg Schwarzenberger (eds.). (London: Stevens & Sons, 1976. Pp. i, 347. Index. £8.00.) The current volume of this *Year Book* offers less of interest to the student of international law and organization than did some of its predecessors. The one paper specifically devoted this year to international law, by Georg Schwarzenberger on the principles of the United Nations in international judicial perspective, is adapted from a chapter in the third volume of his book *International Law as Applied by International Courts and Tribunals* (1976). It exhibits his characteristic conceptual precision and wealth of apposite judicial citations, but it will be misunderstood in its import if read outside the context of the whole work and without reference to the latter's controversial methodical standards, assumptions, and limitations. The critical reader will wish in any case to wait for the full volume. By contrast, on another topic relevant to international law, the concept of war, J. C. Garnett deals chiefly with terminological distinctions which will seem rather elementary to most readers in this field.

Of four papers on aspects of international organization, the most solid is by Margaret Doxey. She follows up her earlier paper on the Commonwealth in the 1973 *Year Book* with an informative overview and appraisal of the Commonwealth Secretariat, its creation, internal organization, and activities. Ambassador Edvard Hambro contributes some observations on the permanent representatives to international organizations, drawing on his personal experiences at the United Nations as well as available literature. Roger Rieber looks at the position of the UN Secretary-General. He analyzes passages from the Secretary-General's Introduction to the Annual Report to the General Assembly to illustrate efforts by the successive incumbents to utilize this document for political leadership in selected fields; but his heavily stated generalizations do not lead beyond reiterating the familiar ambiguities of the office. On international peacekeeping, C. R. Mitchell argues from the literature on domestic police experiences for the negative proposition that domestic practices can provide little guidance in an international context to such bodies as the Cyprus force (UNFICYP). The remaining twelve articles either report on particular regional developments (in Southern Africa, the Indian subcontinent, and Indonesia) or deal with general topics in international politics or economics or in international relations studies and theory.

KURT WILK

BOOKS RECEIVED *

- Académie de Droit International. *Recueil des Cours, 1974.* Vol. 137. Leiden: A. W. Sijthoff, 1976. Pp. vii, 429. Index.
- American Society of International Law. *Re-Making the System of World Trade: A Proposal for Institutional Reform.* A Report of the ASIL Panel on International Trade Policy and Institutions. St. Paul: West Publishing Co., 1976. Pp. 52. \$2.25.
- Angio-Ruiz, Gaetano. *L'Etat dans le sens du Droit des Gens et la Notion du Droit International.* Bologna: Cooperativa Libreria Universitaria, 1975. Pp. viii, 416. Index.
- Bonstein, Claude Serge (ed.). *International Handbook on Contracts of Employment.* Dordrecht: Kluwer, 1976. Pp. xxxv, 297. Index. Table of Cases. Table of Statutes.
- Asian-African Legal Consultative Committee. *Report of the Fifteenth Session, Held in Tokyo from 7 to 14 January 1974.* New Delhi: The Secretariat of the Committee, 1976. Pp. iii, 122.
- Engelhorn, Frederick C. *Détente and the Democratic Movement in the USSR.* New

* Mention here neither assures nor precludes later review.

- York: The Free Press; London: Collier Macmillan Publishers, 1976. Pp. x, 229. Index. \$12.95.
- Behrman, Jack N., and Harvey W. Wallender. *Transfers of Manufacturing Technology Within Multinational Enterprises*. Cambridge, Mass.: Ballinger Publishing Co., 1976. Pp. xix, 308. Index. \$20.
- Bensalah, Tabrizi. *L'Enquête Internationale dans le Règlement des Conflits. Règles juridiques applicables*. Paris: Librairie Générale de Droit et de Jurisprudence, R. Pichon et R. Durand-Auzias, 1976. Pp. xi, 269. Index. F.85.00.
- Bossuyt, Marc. *L'Interdiction de la Discrimination dans le Droit International des Droits de l'Homme*. Brussels: Etablissements Emile Bruylant, 1976. Pp. xi, 262. Index. F.625.
- Bozeman, Adda B. *Conflict in Africa, Concepts and Realities*. Princeton: Princeton University Press, 1976. Pp. xiv, 429. Index.
- Brown, Laura Ferris. *A Selected Bibliography of International Arbitration 1970-1976*. New York: Eastman Library of the American Arbitration Association, 1976. Pp. 26.
- Buzan, Barry. *Seabed Politics*. New York, Washington, London: Praeger Publishers, 1976. Pp. xviii, 311. Index. \$20.
- Chamberlin, Waldo, Thomas Hovet, Jr., and Eric Hovet. *A Chronology and Fact Book of the United Nations, 1941-1976*. Dobbs Ferry: Oceana Publications, Inc., 1976. Pp. 302. Index. \$12.50.
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- Detke, Dieter. *Allianz im Wandel. Amerikanisch-europäische Sicherheitsbeziehungen im Zeichen des Bilateralismus der Supermächte*. Frankfurt am Main: Alfred Metzner Verlag, 1976. Pp. xii, 244. Index.
- Dölle, Hans (ed.). *Kommentar zum Einheitlichen Kaufrecht. Die Haager Kaufrecht-sübereinkommen vom 1. Juli 1964*. Munich: C. H. Beck'sche Verlagsbuchhandlung, 1976. Pp. xxxix, 840. Index.
- Ferencz, Benjamin B. *Defining International Aggression: The Search for World Peace, Vols. I and II*. Dobbs Ferry: Oceana Publications, Inc., 1976. Pp.: Vol. I, xx, 558; Vol. II, xi, 628. Index. \$75 for the set.
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- International Labour Office. *The Impact of International Labour Conventions and Recommendations*. Geneva: ILO, 1976. Pp. vi, 104.
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- Stein, Eric, Peter Hay, and Michel Waelbroeck. *European Community Law and Institutions in Perspective: Text, Cases and Readings*. Pp. lv, 1132. Index. \$22.50.
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- Szekeley, Alberto. *Latin America and the Development of the Law of the Sea. Regional Documents and National Legislation. Vol. I*. Dobbs Ferry: Oceana Publications, Inc., 1976. Pp. 388. (Vol. I of a two-volume looseleaf service). \$60 per vol.
- Thürer, Daniel. *Das Selbstbestimmungsrecht der Völker mit einem Exkurs zur Jurafrage*. Bern: Verlag Stämpfli & Cie, 1976. Pp. 256. Sw.Fr.49.
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- U.S. Department of State. *Foreign Relations of the United States 1948, Volume I, General: The United Nations (in two parts), Part 2*. Washington: U.S. Govt. Printing Office, 1976. Pp. xii, 507-1016. Index. \$8.50.
- . *Foreign Relations of the United States 1948. Volume V: The Near East, South Asia, and Africa (in two parts), Part 2*. Washington: U.S. Govt. Printing Office, 1976. Pp. xvi, 533-1730. Index. Maps. \$15.
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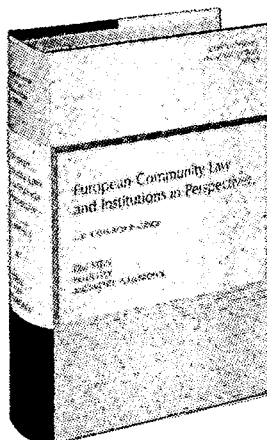
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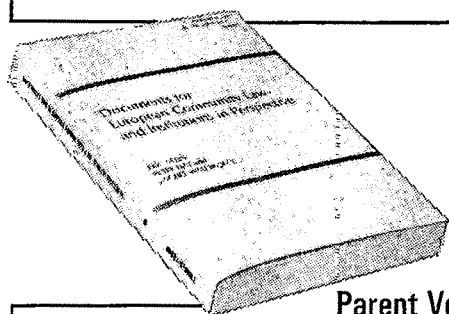
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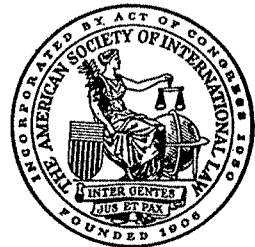
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THE INTERNATIONAL ENERGY AGENCY: AN INTERPRETATION AND ASSESSMENT

*By Mason Willrich and Melvin A. Conant **

When the representatives of thirteen ¹ major OECD oil-importing countries met in Washington, D.C. in February 1974 to discuss cooperation in the energy field in order to meet the challenge posed by the OAPEC ² oil embargo, the outlook for successful negotiations was far from bright.

The participating countries were reeling under grave economic dislocations caused by the unprecedented OPEC ³ oil price increases. Their current account, trade, and payments balances were in disarray. The United States, Canada, Norway, and the United Kingdom possessed domestic energy resources which in time could, if effectively developed, reduce their dependence on foreign sources of oil. However, other countries such as the Federal Republic of Germany, Japan, France, and Italy saw no alternative but to continue to rely heavily on oil imports from the politically volatile Arab world.

Moreover, the spirit of cooperation was dampened by the belief of France and a number of the other countries that an attempt by the consumer governments to take joint action to deal with the oil supply crisis would be viewed as a hostile act, thus further jeopardizing the flow of oil.

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Mason Willrich wishes to express his appreciation to the Royal Institute of International Affairs in London where research for this article was begun while he was visiting research fellow and to The Ford Foundation which provided support for his work at Chatham House. Melvin Conant wishes to acknowledge support from The Rockefeller Foundation. Both authors are grateful to Charles K. Ebinger for his research assistance.

For further discussion by the authors of the fundamental issues raised in this article, see M. WILLRICH, *ENERGY AND WORLD POLITICS* (1975); Willrich, *The Multinational Oil Industries' Future Role*, 52 *VIRGINIA Q. REV.* 560 (1976); and Melvin A. Conant and Fern R. Gold, *Geopolitics of Energy* (Senate Committee on Interior and Insular Affairs, 1977).

¹ The countries participating in the Washington Energy Conference were Belgium, Canada, Denmark, France, Federal Republic of Germany, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, United Kingdom, and United States. In addition to these thirteen countries, the membership of the Organisation for Economic Co-operation and Development (OECD), headquartered in Paris, includes Australia, Austria, Finland, Greece, Iceland, New Zealand, Portugal, Spain, Sweden, Switzerland, and Turkey.

² The members of the Organization of Arab Petroleum Exporting Countries (OAPEC) are Algeria, Bahrain, Egypt, Iraq, Kuwait, Libya, Saudi Arabia, Syria, and the United Arab Emirates.

³ The members of the Organization of Petroleum Exporting Countries (OPEC) are Algeria, Ecuador, Gabon, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates, and Venezuela. Thus Bahrain, Egypt, and Syria, which produce small quantities of oil, are members of OAPEC but not OPEC.

Nevertheless, all the participants in the Washington Energy Conference, except France, agreed to establish an Energy Coordinating Group (ECG) to develop an "international action program to deal with the world energy situation on a cooperative basis."⁴

By June 1974, this preliminary negotiation had evolved into an agreement in principle for an Integrated Emergency Program (IEP) which combined provisions to share oil supplies and restrain demand during supply emergencies with longer range efforts to conserve energy and develop alternative energy sources. In August, the IEP was expanded to include a system for obtaining detailed information from the international oil companies, as well as a mechanism to improve cooperative efforts between oil-consuming and oil-producing countries. This expanded vehicle, known as the International Energy Program (also fortuitously IEP), was approved by the participants in late September, and all other OECD countries were invited to join. In November 19, 1974, sixteen countries met in Paris to sign the Agreement on an International Energy Program,⁵ which established the International Energy Agency (IEA) as the institutional mechanism for implementing the provisions of the program.⁶

The Agreement on an International Energy Program (hereinafter called "IEP Agreement") is complex and long. It consists of a preamble, 76 articles divided into ten chapters, and an annex. It covers a broad diversity of subjects. Some parts are intricate and detailed; others are vague to the point of being meaningless. Many important issues are merely

⁴For the text of the communique issued by the Washington Energy Conference, see 70 DEPT. STATE BULL. 220 (1974), 13 ILM 462 (1974).

⁵For the text of the Agreement on an International Energy Program, see TIAS No. 8378, 14 ILM 1 (1975). For discussion, see testimony of Melvin A. Conant, Assistant Administrator for International Energy Affairs, Federal Energy Administration, in *Hearing on U.S. International Energy Policy Before the Subcomm. on International Food Resources and Energy, House Comm. on International Relations*, 94th Cong., 1st Sess. 81 (1975). See also McCoy, *The International Energy Program*, ESSO EUROPEAN REV. 4 (1974).

⁶The sixteen original participating countries in the IEA included all of the EEC countries, except Norway, plus Austria, Spain, Sweden, Switzerland, and Turkey. New Zealand subsequently joined and Norway has special limited membership. Greece joined the IEA in 1976, bringing the current membership to nineteen. France, though not a member, maintains liaison with the IEA through the Commission of the European Community. The Commission has observer status.

Which of the various countries ostensibly involved in the IEP are legally obligated under the Agreement, and to what extent, is difficult to answer. The Agreement became binding "provisionally" for all signatories "to the extent possible not inconsistent with their legislation" as of November 18, 1974. However, many of the more important provisions regarding emergency oil sharing could not become effective in the United States, for example, without enactment of domestic implementing legislation. The signatories of the IEP Agreement were given until May 1, 1975, to obtain any necessary implementing legislation, although the IEA Governing Board may extend the time limit. In the United States necessary authorizing legislation is contained in the Energy Policy and Conservation Act, enacted in December 1975, Pub. L. No. 94-163 (1975). For discussion, see M. WILLRICH, *ADMINISTRATION OF ENERGY SHORTAGES* 163-67 (1976).

raised and referred to the IEA machinery to be dealt with subsequently in detail.

The main objectives of the IEA as stated in the preamble to the IEP Agreement are:

—To promote secure oil supplies on reasonable and equitable terms.

—To take common, effective measures to meet oil supply emergencies by developing an emergency self-sufficiency in oil supplies, restraining demand, and allocating supplies among member countries on an equitable basis.

—To promote cooperative relations with oil-producing countries and with other consuming countries including those of the developing world.

—To play an active role in relation to the oil industry by establishing a comprehensive international information system and a permanent framework for consultation with oil companies.

—To reduce dependence on imported oil by undertaking long term cooperative efforts on conservation of energy, on accelerated development of alternative sources of energy, and on research and development in the energy field.

Creation of the IEA was very much an American initiative. The Agency was regarded in large part as a reflection of Secretary of State Kissinger's desire to reassert U.S. leadership in the industrial world; to prevent debilitating competition among the industrial countries which could result in even higher prices for oil supplies and also in preferential arrangements between particular consumers and producers which might exclude the United States; and to confront OPEC with a counterweight of consuming states.⁷ Henceforth, it would cost the oil producers considerably more financially and politically to use the oil weapon.

The other participating countries were understandably surprised when, in the very midst of the negotiations for the creation of the IEA, Washington announced the establishment of its own special relationship with Saudi Arabia. While the United States attempted to explain that it covered only economic and military matters, no one around the IEA table thought for one minute that oil was not involved.

Despite such prenatal traumas, and while most of the participating countries were quite aware of Kissinger's intention, they also realized the common need to limit their vulnerability to supply shortfalls. This common requirement, together with the potentially conflicting desire of these countries not to be "confrontational," tested above all the skill of Etienne Davignon, the able Belgian diplomat who chaired the difficult negotiations to their conclusion.

The negotiated outcome expresses the unity of ends of the IEA participants—securing adequate and continuous oil supplies—but it disguises their diversity of interests, needs, and means. Creation of the IEA was heralded by Secretary of State Kissinger as "one of the great success stories

⁷ See H. Kissinger, *Energy: The Necessity of Decision*, 72 DEPT. STATE BULL. 237 (1975).

of the last decade-and-a-half"⁸ and denounced in the U.S. Senate as "merely a mirage."⁹

What, then, is the significance of the IEA and the IEP Agreement in relation to the world energy situation? Not surprisingly, our conclusion is that the effort as a whole so far falls well below Secretary Kissinger's claim, though IEA surely amounts to something more than a mirage. On the one hand, the IEP Agreement provides a possible framework for developing an energy strategy for the industrial countries in the new era that was ushered in by the oil price revolution engineered by OPEC in 1973-74. On the other hand, because the IEP Agreement is a compromise, the result of international logrolling, there are important unanswered questions regarding both the strength of the commitments of the participants to the overall effort and the effectiveness of the IEA mechanisms if they should be put to the test.

Originally intended to serve as a demonstration of industrial country unity, the IEA reflects the diversity of interests and positions of the major countries in the industrialized world. From its inception, the organization has been plagued by differences. The failure of France to join what it considered to be an organization of "confrontation" dominated by the United States is only an early example. Different perspectives, derived in part from the different resource positions of the individual member countries, continue to make international consensus difficult to achieve and may erode some agreements already reached.

IEA cooperation in energy is intended to result in a concerted program for reducing dependence on OPEC oil, including the elaboration of conservation measures, the undertaking of joint research and development projects to make available new energy sources, and the further development of oil and other existing energy sources within the participating countries. Another important, though muted, aim is to apply pressure to domestic legislatures and other governmental decisionmaking bodies to adopt the comprehensive national energy policies that are essential to support agreements reached in the international arena.

Despite the diplomatic fanfare surrounding the establishment of the IEA, the energy strategy of the industrial countries specifically contemplated in the program remains to be implemented more than two years after the Agreement was concluded. Thus the utility of the strategy remains to be demonstrated.

UNDERLYING ASSUMPTIONS

Two basic and related assumptions underlie the creation of the IEA: (1) The oil supply security of each participating industrial country will be more enhanced by cooperation than by independent action; and (2)

⁸ *Id.*

⁹ Sen. Howard Metzenbaum (D., Ohio). Remarks before the Senate Comm. on Interior and Insular Affairs, 93rd Cong., 2d. Sess., Nov. 26, 1974.

The preferred, if long range, way to resist the monopoly power of OPEC in world oil is through development of countervailing power.

To evaluate the validity of the collective security assumption, one asks whether the participating countries have a common conception of the nature of the anticipated threat and whether their concern is of short or long term duration. In relation to the security of oil supplies, the threat seemed quite narrowly drawn at the time of the IEA's creation—Arab use of the oil weapon in support of their conflict with Israel. It should be noted that an IEA participant may from time to time perceive the linkage between oil availability and the Arab-Israeli conflict in various ways:¹⁰

(a) A participant may believe that, because of its policy of support for Israel, it will be a primary target of the Arab oil weapon;

(b) A participant may believe that, despite its own even-handed or Arab-tilted policy in the Arab-Israeli conflict, it is likely to be a target of the oil weapon in an indirect Arab effort to pressure countries such as the United States which materially support Israel;

(c) A participant may believe that, due to the integrated structure of the world oil market, there is no escape from damage in the event of Arab use of the oil weapon against one or more large industrial importers.

Those countries participating in the emergency sharing program that find themselves to be secondary targets of an oil embargo or subject to damage from an embargo against others may prove to be relatively unreliable allies. In short, these countries may opt out in anticipation of, or during, an actual emergency.

EMERGENCY OIL SHARING

The Principle

Because of the different views of the nature of the security threat among IEA participants, longer term efforts to reduce dependence on Middle East oil required prior agreement on measures to see countries through the short term possibilities of sporadic and/or politically inspired supply disruptions. This was the intention, at least of the United States, United Kingdom, and Germany and possibly of Japan. A mutually beneficial oil-sharing mechanism for use in an emergency would give the IEA an initial cohesive bond.

A cardinal tenet of early IEA discussions was that a total OPEC-wide oil supply interruption, as distinguished from an OAPEC embargo, was improbable because there was no common political purpose of such great consequence to every OPEC member that a generalized embargo could be implemented or, if begun, could be maintained for long. On the other hand, the IEA participants, still staggering under the economic impact of

¹⁰ For an elucidation of IEA goals, see Davignon, *The Aims of the International Energy Agency*, in *THE INTERNATIONAL ENERGY AGENCY OF THE OECD* (OECD pub., n.d.).

the Arab embargo, may have overestimated the potential cohesion of the tighter knit OAPEC over the period of a sustained embargo.

If the emergency situations to be prepared for were future OAPEC embargoes, then the United States would probably be the prime target. From an American perspective, the emergency oil-sharing mechanism was central to the IEA. Moreover, the international oil companies had scarcely recovered from the awesome responsibility of managing the burden of the 1973 embargo equitably, and they were still smarting from the animosity of consuming and producing governments which became suspicious of the companies' allocations.¹¹ The companies were thus willing to have governments now assume general responsibility for determining the need and principles for the sharing of oil supplies in future emergencies, although they did not wish to relinquish their control over the logistics system.

By mid-1976, the details of the oil-sharing formula had been agreed between governments, and an emergency management manual detailing rules and procedures for implementing the oil-sharing program had been approved. Member governments committed themselves to maintain 60 days of oil imports, to be increased to 90 days as soon as possible. A trial run of the system was finally held at the end of 1976, after having been previously scheduled and cancelled because of concern over OPEC members' reactions and unresolved antitrust issues growing out of the need for communication between the thirty oil companies participating in the plan.

In principle, if an emergency occurs, the IEA Secretariat determines that the oil supplies of an individual country or group of countries have fallen below a specified amount, and oil sharing among participating countries is automatically implemented. The oil-sharing procedures, which are discussed in the next section, are designed to allocate available oil supplies and to provide for oversight of the logistics system which remains under the operational control of the international oil companies. The burden of the supply shortfall of an individual country, or the group as a whole, is to be shared among the nineteen participating states.

Although the formulas for allocation are complex, the underlying principles are simple. If oil imports to the group as a whole are embargoed, each participant must reduce its consumption by the same percentage and the remaining supplies are distributed pro rata among the group as a whole according to historical pre-embargo consumption patterns. If oil imports to selected participants are embargoed, those that are the targets must first diminish their demand for oil. They will then become entitled to pro rata allocations from the other members of the group.

The oil-sharing formula as outlined in Article 10(I) of the IEP Agreement only addresses in general terms the question of the price at which

¹¹ See, for example, *U.S. Oil Companies and the Arab Oil Embargo: The International Allocation of Constricted Supplies*. Statement prepared by the Federal Energy Administration, Office of International Energy Affairs for the Senate Foreign Relations Subcommittee on Multinational Corporations, 7-29. 93rd Cong. 2d. Sess. (1975).

reallocated oil will sell. As a result, there remains room for argument on how these principles should be applied in particular cases. This is an important and complicated matter for all those in the distribution system. The oil companies have also asked that, in return for their cooperation with IEA and their implied disregard of some producer state policies, they should have redress if oil producers take punitive action against them. The IEA generally is cold to this proposal, and it is unlikely to be adopted.

However, the problems associated with the emergency oil-sharing formula go deeper than this. While the United States and some oil companies may welcome the emergency sharing mechanism, the Europeans and Japanese have reason to be less enthusiastic. From their viewpoint, while the capability to cope with shortages is generally a "plus," the emergency sharing formula is also seen to multiply their risks. It would seem almost to guarantee that they too will be involved in future embargoes the primary aim of which is to influence the United States. Moreover, both Norway and the United Kingdom have been reluctant to agree to a formula which could reach and allocate some of their new petroleum resources in the North Sea, although to date only Norway has taken its reluctance to the point of altering its status in the IEA to preserve its freedom.

If Europe and Japan were the targets of an oil embargo derived from Arab dissatisfaction with the course of Arab-Israeli affairs in order to bring indirect pressure to bear on the United States, Europeans and Japanese would possibly find themselves called upon to bear the consequences of U.S. Middle East policy. The United States would be unlikely to have any oil to contribute to available supplies in order to offset the effects of the embargo, and the burdens would be shared largely by Europe and Japan. On the other hand, if the United States were the direct target, the necessity for sharing with the United States would reduce supplies available for domestic use by other IEA participants, even if oil supplies continued to Europe and Japan at pre-embargo levels. Moreover, even if Europe and Japan were initially excluded from the embargo, their compliance with the IEA requirement for sharing would force them to incur the displeasure of the Arab oil producers. These complex factors were clearly in the minds of the governments negotiating the creation of the IEA and are still present.

Apart from an embargo, IEA oil sharing may also be useful for supply shortages arising from other causes, such as possible conservation policies adopted by certain producing states or political and perhaps military conflicts in the Persian Gulf area.

Furthermore, the existence of the oil-sharing mechanism for the industrial countries may suggest to OPEC the possibility that a new embargo would be more costly to the producing states than was the 1973 embargo. Thus the IEA may serve as a deterrent to a future OPEC embargo and might make more difficult another attempt by exporters to differentiate preferentially among the major importers. However, in the event of a prolonged

interruption or shortage of oil supplies, the divergent interests of the IEA participants will put increasing strain on their common commitment.¹²

Supply Rights and Obligations

The bulk of the IEP Agreement is directly attributable to what appears at first glance to be a very detailed and complete scheme for international management of any future interruptions in imports of oil to the participating countries. On closer inspection, the scheme becomes bewildering in its complexity.

The common scheme to deal with oil supply emergencies includes the establishment of emergency reserves, measures of demand restraint, an allocation system, procedures for activating the various emergency measures, an information system including a mechanism for consultation with the oil companies, and institutional machinery to develop and implement the scheme as a whole.

Each participating country undertakes to maintain an "emergency reserve commitment" equivalent to 60 days of its net oil imports.¹³ The IEA Governing Board may extend the commitment from 60 days to 90 days. This is now the goal. In addition to the period specified, the definition of what oil stocks are included is crucial in determining the value of the "emergency reserve commitment." The present definitions are very loose, making it easy for most countries to satisfy a 90-day commitment out of normal working inventories plus fuel-switching capacity plus standby oil production (if any). The Governing Board may tighten the definitions in the future but has not yet done so.¹⁴

Each IEA participating country undertakes to "have ready" a program of contingent measures of restraint on oil demand, enabling it to reduce its rate of "final consumption" by seven percent initially and by ten percent subsequently.¹⁵ (Defining final consumption and determining the base period against which reductions are to be measured are complicated and controversial problems.) Emergency reserves in excess of the required commitments may be substituted for demand restraint. This seems to mean that a country which establishes a substantial strategic reserve may become entitled to allocations of oil from other participants even without actually undertaking any demand restraint itself. Presumably, "have ready" means to have legislative authority enacted and detailed administrative plans on the shelf.¹⁶ In addition, the IEA is required to develop

¹² *Id.*

¹³ IEP Agreement, Art. 2.

¹⁴ IEP Agreement, Art. 3.

¹⁵ IEP Agreement, Arts. 5 and 14.

¹⁶ In the United States, the Energy Policy and Conservation Act, Pub. L. No. 94-163 (1975), contains authority to participate fully in the IEP. This includes standby authority to implement energy conservation, §202, and motor fuel rationing, §203, in a supply interruption, and authority to establish a reserve of 150,000,000 barrels by the end of 1978 and to plan for a larger strategic reserve to be implemented subsequently, §§151-166.

"practical procedures" for allocation and "procedures and modalities" for participation of the oil companies.¹⁷

In the event of an oil supply emergency, the oil allocation and sharing procedure to be used under the IEP Agreement depends on whether the group as a whole sustains a reduction in its oil supplies or whether any participating country (but not the entire group) initially sustains such a reduction.

In case of a general embargo, where the group as a whole sustains a reduction, each participant has a supply right equal to its "permissible consumption" minus its "emergency reserve draw down obligation."¹⁸ "Permissible consumption" is defined as final consumption after demand restraint measures have been applied. The "emergency reserve draw down obligation" is defined as the group's oil supply shortfall multiplied by the ratio between the participant's and the group's emergency reserve commitments.

On the basis of each participant's supply right, it is determined whether the participant has an allocation right *from* the group or an allocation obligation *to* the group. If the participant's supply right is greater than its "normal domestic production" plus actual net imports available, then the participant has an allocation right equal to the amount of the difference. If the participant's supply right is less than "normal domestic production" available plus actual net imports available, then the participant has an allocation obligation equal to the amount of the difference.¹⁹

The United States has thus made its own domestic oil production subject to the international sharing scheme under the IEP Agreement. The likelihood of the United States actually being called upon to share its domestic production with other IEA countries in an emergency is extremely remote, however, in view of U.S. oil import levels. Indeed, the supply emergency which would then exist would be so grave as to amount to the kind of actual strangulation Secretary Kissinger may have had in mind as a possible situation in which resort to force might be justified.

It is also noteworthy that "normal domestic production" is a key term that remains undefined in the IEP Agreement. In the United States, domestic oil production has decreased since the early 1970's, although this trend will be reversed for at most a few years when oil from the Alaskan North Slope becomes available.

In case of a selective embargo, where one participant sustains a reduction in its oil supplies, that participant must first reduce its final consumption by seven percent, presumably by demand restraint.²⁰ Thereafter, the embargoed participant has an allocation right from other IEA members equal to the amount of its supply shortfall in excess of seven percent. The embargoed participant's shortfall is then distributed among the other participants in the same manner as if that amount of shortfall were sustained by the group as a whole.

¹⁷ IEP Agreement, Art. 6.

¹⁹ IEP Agreement, Art. 7.

¹⁸ IEP Agreement, Art. 7.

²⁰ IEP Agreement, Art. 8.

It would seem that a selective embargo against a country with a relatively small share of the group's total imports would be relatively easy for the group to manage, whereas a substantially effective embargo against a very large importer such as the United States and/or Japan could be quite difficult for the remainder of the group to cope with.

IEA—Oil Industry Relations

The measures previously outlined for emergency oil sharing could not be implemented in an actual emergency situation without detailed information from, and active cooperation of, the oil companies which still control the worldwide logistical network.

Under the IEP Agreement, a Standing Group on the Oil Market (SOM) and a Standing Group on Emergency Questions (SEQ) incorporating a two-tier information system are established within the IEA.²¹ One tier of the information system, the "General Section" under the SOM, deals with the situation in the international oil market and activities of the oil companies. The other tier, the "Special Section" under the SEQ, is specially designed to "ensure the efficient operation of the emergency measures." The SOM is to be a "permanent framework for consultation" under the IEA within which a participating country may "consult with and request information from individual oil companies on all important aspects of the oil industry." These provisions involve highly sensitive matters, both for the oil companies and for the governments. Their inclusion in the IEP Agreement evidences, on the one hand, mistrust of the oil companies and a desire among many participating countries (Europe and Japan) to make the operations of the companies more "transparent," and, on the other hand, a necessary reliance on the oil companies to cooperate in designing workable emergency measures and subsequently to operate the worldwide logistical system in a future supply emergency so as to effectuate the IEA's contingency plans.

In implementing these provisions of the IEP Agreement, a controversial issue with respect to the General Section has been whether oil company information shall be supplied by each participating country in aggregate or disaggregated form. The United States has favored aggregation in order to prevent disclosure of information of a character that might have anticompetitive effects on the industry. Regarding oil prices, the IEA prepares quarterly breakdowns for sixteen key crude oil systems, f.o.b. and c.i.f., compiled from company data which the IEA obtains very largely from governments, not from the companies. With the price survey (available only to the IEA and governments), the participating governments can better evaluate the price of their imported oil. In addition, the IEA receives data on oil acquisition costs of the companies through the Industry Advisory Board (IAB).

²¹ IEP Agreement, Art. 25. For the details, see *Hearings*, *supra* note 9, at 9-12.

The IEA survey can serve as a yardstick against which the "reasonableness" of prices can be assessed. Transparency with regard to price and cost permits governments: (1) to determine the difference in profit margins between countries and to ask the companies to justify differences found to exist; (2) to learn whether companies favor their affiliates and discriminate against independents; (3) to evaluate the balance of payments impact of oil imports; and (4) to determine whether a less expensive source of oil may be available. In addition to price and cost data, the IEA information system includes data on stocks and production.

Recently, the IEA has indicated that it will invade the most sensitive area of corporate endeavor—company finances. The professed aim is to assess the industry's ability to meet investment needs and to encourage government to remove existing impediments to investment in energy areas (which they are committed to do under IEA rules).²²

Therefore, although the international oil industry was scarcely consulted by governments—the United States included—as to the IEA purposes and programs during the negotiations leading to its establishment, one result of the negotiations has been a mechanism for consultation between governments and the oil companies.

The relationship of the oil companies to the countries participating in the IEP raises important questions: What effect will the information and consultation system have on the competitive structure of the multinational oil industry? Given the disparity among member government attitudes toward the private sector and the differences in oil company operations within various countries, will transparency provide a reason for some countries to impose substantial restrictions on the freedom of movement of oil companies in their transnational operations? In the event of a supply emergency, how can the oil companies operate under conflicting obligations imposed on them by exporting and importing countries? Would the importing countries be better off under a clearly prescribed set of rules for the oil companies which will be known in advance by the exporting countries, or with flexibility to tailor a response to the rules prescribed by the exporter for the particular embargo scenario? Has the creation of the intergovernmental IEA made a future embargo more or less likely to escalate than if the oil companies were left, as they were in 1973–74, to manage the shortfalls as equitably as they could? With these questions in mind, we turn to the manner in which the IEA oil-sharing measures would be activated in an emergency.

Activation of Emergency Sharing

In case of an oil supply emergency, the full range of the IEA machinery comes into play.²³ The IEA Secretariat makes a "finding" when a reduc-

²² Under the Energy Supply and Environmental Coordination Act, 15 U.S.C.A. §796 (Supp. 1975), and the Energy Policy and Conservation Act, Pub. L. No. 94-163, §503 (1975), the U.S. Federal Energy Administration has sweeping discretionary authority to request and collect energy information. See M. WILLRICH, *supra* note 6, at 167.

²³ IEP Agreement, Arts. 12–22.

tion of oil supplies available to the group as a whole or to a participating country "has occurred or can reasonably be expected to occur."²⁴ In making its finding, the Secretariat must consult with the oil companies, which are constituted into an International Advisory Board to assist the IEA. The Secretariat immediately reports its finding to the Management Committee, composed of senior representatives designated by the various participating governments, and also informs the participating countries directly.

Within 48 hours (Secretariat finding + 2 days), the Management Committee meets and reviews the accuracy of the Secretariat's report. Within a further 48 hours (Secretariat finding + 4 days), the Committee reports to the Governing Board, composed of Ministers of the participating countries. Within a further 48 hours (Secretariat finding + 6 days), the Board meets to review the Secretariat's finding in light of the Management Committee's report. Within a further 48 hours (Secretariat finding + 8 days), the activation is "confirmed" unless the Governing Board by special majority decides otherwise. Implementation begins within 15 days of confirmation (Secretariat finding + 23 days). Any "decisions" of the Management Committee or the IEA Governing Board may be reversed by the Board by a majority vote.

The activation procedures raise two problems. First, the potential delay of 23 days between the Secretariat's initial finding and the commencement of actual implementation of emergency measures may mean that a participating country could have used up a substantial part of its emergency oil reserves before anything further happens. (The IEA can, of course, act faster if it chooses.) Furthermore, even though the activation process is considered "confirmed" unless the Governing Board decides otherwise by a special majority (see subsequent section on voting procedures for a definition of this term), it may be argued that a bare majority of the Board can reverse on the theory that the confirmation is itself a "decision." It is also unclear what position the Governing Board would be in if it were confronted with a Secretariat finding that an emergency exists and a Management Committee report in which a majority may have expressed views opposed to the Secretariat's finding. These ambiguities seem to leave room for considerable debate, delay, and acrimony, although it has been claimed that one of the virtues of the IEP Agreement as a whole is the automaticity of the emergency activation procedures.

Once the emergency procedures are activated, the Secretariat makes a further finding when emergency reserve draw down obligations reach 50 percent of commitments.²⁵ This finding triggers another complicated review process, eventuating in a Governing Board decision nine days later to move from seven percent to ten percent demand restraint. Finally, the Board by unanimity may "activate any appropriate emergency measures" beyond those specified in the Agreement.²⁶

²⁴ IEP Agreement, Arts. 13, 14, 17, 19.

²⁵ IEP Agreement, Art. 20.

²⁶ IEP Agreement, Arts. 20, 22.

The Governing Board may adopt recommendations and decisions in three ways: majority, special majority, and unanimity.²⁷ Where no express voting provision is made, the Board must use a majority vote for decisions on the management of the existing Program, on procedural questions, and on recommendations. All other decisions where no express provision exists shall be by unanimity.

Each participant is given three "general voting weights" and a certain number of "oil consumption voting weights" depending on the participant's "share in total oil consumption." "Combined voting weights" are the sum of the "general" and "oil consumption" weights.²⁸ These voting weights are to be reviewed annually by the Governing Board, and they are to be reviewed each time a country accedes to or withdraws from the Agreement.

A majority vote requires 60 percent of the total combined voting weights and 50 percent of the general voting weights cast. That is, it presently takes ten countries with 95 combined voting weights out of a total of 157 for a majority vote.

A special majority vote may require either 60 percent of the combined voting weights and 42 or 48 general voting weights.²⁹ The 60 percent combined total and 42 general weights are required for decisions on: increases in emergency reserve commitments; decisions not to activate the emergency measures for the group; decisions on the measures "required for meeting the necessities of the situation"; and decisions on deactivation in disagreement with the Secretariat.³⁰ Thus, for such decisions, fourteen nations must vote in favor of the decision. But even if fourteen so vote, the United States and any *one* of several nations—Japan, West Germany, Italy, or the United Kingdom—could block the decision because the United States and any one of these nations hold more than 40 percent of the combined voting weights. The 60 percent requirement would not be satisfied. In most embargo scenarios, the United States could probably count on support from at least one of these nations.

A special majority requiring 48 general votes only must be used for decisions to deactivate, to maintain, or not to activate emergency measures where a single nation faces a supply shortfall under Article 17. This means sixteen nations must vote for the decision in order for it to pass. Once again two nations become the "swing" votes, since one of the nineteen participants will be the country facing the shortfall. Any combination of three countries "against" the decision would defeat the decision.

A unanimous vote requires all of the votes of the participants "present and voting." An abstention shall be considered as "not voting."³¹

²⁷ IEP Agreement, Art. 61.

²⁸ IEP Agreement, Art. 62. Greece and New Zealand have no oil consumption votes. Norway has signed a special protocol agreement regarding its rights and obligations.

²⁹ *Id.*

³⁰ Woodliffe, *A New Dimension to International Cooperation: The OECD International Energy Agreement*, 24 INT. AND COMP. L. Q. 535 (1975).

³¹ IEP Agreement, Art. 62.

In view of the size of emergency reserve commitments and depth of demand restraint measures, the emergency procedures seem designed to manage a rerun of the selective destination embargo imposed by the Arab members of OPEC in 1973-74. The procedures are not designed to cope with an OPEC-wide embargo or substantial production cutback. Moreover, it would seem to be extremely difficult to manage within the IEP Agreement a selective 100 percent Arab embargo against several participating countries, such as Japan, Italy, and the Federal Republic of Germany, which are heavily reliant on Middle East imports in relation to their final consumption. The workability of IEA emergency sharing may thus depend on these countries' maintenance of a pro-Arab tilt in their Middle East policies.

LONG TERM ENERGY COOPERATION

Beyond emergency oil sharing, the IEP envisions a broad range of cooperation among participating countries in the field of energy. The IEA's Standing Group on Long-Term Cooperation (SLT) is assigned the responsibility for energy conservation, the development of alternative energy resources, and other measures designed to reduce the dependence of member countries on imported oil.³² In March 1976, IEA members, including the United States, formally agreed to a program of specific long term measures, including: the strengthening of conservation efforts; the removal of obstacles which might impede accelerated development of indigenous energy resources; and the stimulation of investment in energy development, including a strategy for energy research and development.

A particularly controversial issue involves agreement on a \$7/bbl. minimum safeguard price (MSP) for crude oil.³³ The problem arises from the fact that those industrial countries having high-cost energy options have fundamentally different interests from those countries which do not possess such domestic reserves. The former want to guarantee that IEA members will adopt whatever measures may be necessary to maintain high prices for imported oil. By so doing, public and private undertakings to develop indigenous oil supply or alternative energy sources would be protected against the risk of a precipitous decline in the price of imported oil, perhaps due to an OPEC decision to undercut such industrial country efforts to free themselves from the cartels domination.

In arguing against the MSP in other forums, the French claimed that adoption of such a floor price would lock in high energy prices. In addition, they insisted that if a MSP were needed to stimulate investment in alternative sources of energy, including "conventional" forms, then the \$7/bbl. price would be inadequate to the point of absurdity. The French

³² IEP Agreement, Arts. 41-48. For discussion, see *supra* note 11, at 13-14.

³³ For a discussion of the U.S. position on the MSP issue, see DEPT. OF STATE SPEC. REP. NO. 16, ENCOURAGING INVESTMENT IN DOMESTIC ENERGY: MINIMUM SAFEGUARD PRICE (April 1975). See also, Enders, *OPEC and the Industrial Countries: The Next Ten Years*, 53 FOREIGN AFFAIRS 625-37 (1975).

were undoubtedly right. Such a low level was, however, necessary in order to obtain concurrence of other IEA member states in the U.S. proposal. The \$7 floor price simply reflects the interests of industrial countries which can conceive of no energy undertaking more important than a lowering of the cost of energy. So far, the European Community has been unable to adopt the MSP, although its members (except France) are committed to it through their adherence to the IEA. The MSP issue also became a source of conflict between the U.S. Congress and the Ford Administration, which claimed at one time that it possessed sufficient executive authority, without specific enabling legislation, to bind the United States to the \$7/bbl. floor price. Much of the concern over the MSP voiced in the Congress was similar to the views expressed in the IEA.

Despite the importance which it attached to this initiative, the United States did not obtain more than a tenuous understanding reached "in principle" on the MSP in July 1976. It is easy for participants with or without high-cost domestic energy resources to agree in principle to a common minimum price without fixing an actual price or to agree to a range of prices broad enough to mask underlying differences, or to condition their agreement in such a way as to provide satisfactory outs for those who want to take advantage of a substantial break in OPEC prices should one occur. Agreements incorporating such ambiguities reflect less of a common understanding and commitment and more of an effort to paper over real differences of such importance as to render this kind of effort futile. Worse, other IEA understandings may become more tenuous when one of the agreed measures is so clearly unrealistic.

The SLT is also attempting to prohibit discrimination among IEA members with reference to participation in energy supply projects. IEA members have pledged that they will consider the rights of foreigners to export to their home country at least some of the product from joint energy projects undertaken within their respective territories. Canada, however, has refused to agree to the nondiscrimination requirement, and several other IEA members have indicated that their acceptance of the MSP, even in principle, is contingent upon Canada's eventual agreement to the non-discrimination provisions of the long term cooperation agreement. While Canada sometimes appeared to stand alone on this matter, there is ample reason to believe that the enthusiasm of many IEA members, including notably the United States, has diminished for nondiscriminatory access to their own energy resources that might be developed in the future with foreign participation. At least, enthusiasm may exceed political wills to deliver. The State Department was warned repeatedly that Congress would not agree to a loose conception of foreign "access."

The IEA has concluded several agreements on energy research and development projects, particularly in the nuclear field. The nuclear agreements call for: a plan for exchanging information on nuclear safety; joint efforts in varying techniques associated with the disposal of radioactive waste; joint research to evaluate high temperature reactors; the construc-

tion of an intense neutron energy generating facility; and cooperation in uranium enrichment. Other IEA research and development projects include cooperation in the area of coal technology, solar energy, deriving hydrogen from water, and waste heat utilization. These IEA undertakings are of varying degrees of commitment and value. While much may come of some of them, it is arguable that each could as easily have been started on the basis of ordinary bilateral government-to-government programs, or by the private sector without government intervention or support. There may be a "make work" aspect to these IEP provisions.

INDUSTRIAL COUNTRY ENERGY STRATEGIES

In one way or another, the IEP contains suggestions for every possible strategy to deal with the new world energy situation and an impressive commitment to none. It does, however, contemplate that the participating OECD industrial countries will develop and pursue a common strategy. Having considered the IEP itself we now examine the major strategic energy options and tactics which the IEP members might consider.

OPEC Cartel Destruction

By cartel destruction, we mean bringing about a situation in which OPEC loses its ability to dictate prices.³⁴ Although this strategy aroused much discussion in IEA and especially in U.S. Government circles through 1974-75, the cartel did not disintegrate nor is there reason to believe that it will. There are tensions within OPEC: foreign exchange deficit v. surplus countries; Arab v. non-Arab countries; conservative v. radical regimes, etc. These intra-OPEC tensions could become uncontrollable, with devastating consequences for the Middle East and the world at large. Since 1973, however, several OPEC states have demonstrated their capability to cut back production in order to maintain prices. If economic recovery more or less continues in the industrial countries, the demand for OPEC oil will continue to rise, thus exacerbating potential competition among OECD importing countries for Middle East oil in particular.

Recent actions by Saudi Arabia, which have been seen as fracturing OPEC unity, are obviously important initiatives that appear to challenge the OPEC "single price" strategy which has worked so well. The intra-OPEC tensions have been exacerbated but the survival of OPEC is not at question. The objectives of Saudi Arabia and the pressures upon the regime will be clearer with time. While some in the United States profess to believe that the Saudi actions are a result of industrial country energy

³⁴ OPEC is arguably not a cartel in the technical sense of an agreement to exercise monopoly power through control over output and price. As an organization, OPEC establishes prices for crude oil produced by its members but not production quotas. Consequently, an OPEC price increase can be maintained only if some of its sparsely populated members with lesser revenue requirements, such as Saudi Arabia, Kuwait, and Libya, will voluntarily restrict their output.

strategies, it is difficult to put that gloss on an admittedly very complex situation. We are still faced with the necessity of examining the routes open to oil importers and assessing the major options open to them.

Coercive means aside, discussions of industrial country tactics to bring about OPEC cartel destruction focus on three key areas of action: demand restraint and energy conservation; development of non-OPEC oil resources; and development of alternative high-cost energy resources, in addition to high-cost petroleum reserves.

In all three areas, the thinking of policymakers seems to have been more wishful than practical. However, of far more interest than the tactical details of cartel destruction is the question of whether or not, from an industrial country viewpoint, the strategy would be self-defeating. Each of the tactical approaches outlined above would require large capital-intensive investments to implement, and would have to be pursued vigorously and extensively in order to affect even remotely OPEC's domination of the world oil market. The long lead times necessary to implement effective conservation and supply development measures could provide ample opportunities for the cartel to institute major price rises or supply curtailments. Finally, investments once made would have to be protected. As industrial countries implement a strategy of cartel destruction, their primary interest may thus shift from destruction to cartel stabilization.

U.S. policy is notably silent thus far on how the benefits of lower oil prices that would result from cartel destruction (to which it still remains overtly committed) would be distributed among the industrial countries. In the case of the minimum safeguard price, the United States has, however, opted for a method of protecting investments that would seem to preclude passing through to the final consumers the benefits of oil prices below the safeguard minimum. This is necessary in order to prevent the lower price from unduly stimulating consumer demand and thereby creating world market conditions in which the cartel might be resurrected!

If the Europeans and Japanese suspected that the United States was reaping the major benefits from a cartel destruction policy, then they might opt out of the minimum safeguard price agreement in an attempt to capture the trade benefits of lower OPEC prices. On the other hand, there is the possibility that high-cost industrial producers and lower-cost OPEC producers might make a deal over the heads of the resource-poor industrial countries and the less developed countries. In any event, success in implementing a cartel destruction policy would likely exacerbate tensions within the IEA, thus bringing about its own collapse.

IEA-OPEC Cooperation

The fact is that, since the 1973-74 oil price revolution, OECD-OPEC economic interdependence has increased enormously. The flow of high-priced oil from OPEC to the industrial countries has generated a reverse flow of high-priced manufactured good, industrial technology, and arma-

ments from OECD to OPEC. The buildup of enormous financial surpluses in a few Arab OPEC countries has led these countries to provide some financial support to the weaker industrial economies and to make long term investments in the economically stronger industrial countries. On the one hand, the economic and financial opportunities for cooperation between industrial importers and resource-rich exporters became immediate, urgent, and of overwhelming importance. On the other hand, the opportunities for energy cooperation among oil importers became either contingent, in case of a renewal of an embargo, or very long term, in the case of development of alternative energy supplies and implementation of conservation measures involving changes in technological infrastructures. Consequently, the development of OECD-OPEC economic relations now overshadows the development of industrial country energy cooperation within the IEA framework.

In deepening OECD-OPEC relationships, the approach so far has been largely bilateral at the governmental level and transnational at the industrial level. As noted earlier, France chose to remain aloof from the IEA, motivated in part by resistance in principle to American hegemony and in part by the possibility of obtaining a competitive advantage in the scramble for bilateral deals. However, France has so far apparently gained little from its independent course.

The industrial country "rush to cooperate" could undermine the IEA more than OPEC. Indeed, OPEC was formed for the basic purpose of bringing about a trade relationship with industrial countries on terms more advantageous to its oil-rich members. But the rush to create substantial trade relations also seems to erode the respective positions of one set of actors within each grouping. IEA-OPEC cooperation may undermine the position of the high-cost energy producers in the IEA which view the industrial country grouping, with some ambivalence, as a means of both enhancing their security of supply and assuring the competitiveness of their economies vis-à-vis other industrial countries as they proceed to develop their high-cost energy sources. Furthermore, IEA-OPEC cooperation may undercut the radical group within OPEC which sees their organization as a vehicle for accelerating their own economic advance and also as a platform for mobilizing and leading the poor of the Third World into confrontation with the affluent industrial world, in the name of a New International Economic Order.

At the level of multilateral diplomacy, the high-cost energy producers within the IEA—in particular the United States, the United Kingdom, and Germany—may assert the need for a common industrial country position in any consumer-producer negotiations in order to put the brakes on a large-scale compromise that could in fact increase the difficulty of proceeding with the development of high-cost energy resources. To an extent, the United States pursued this tactic in the Paris based Conference on International Economic Cooperation (CIEC) by its original demand that the work of the Energy Commission be separated from the work of the

other Commissions established by the Conference as a whole. The United States may have attempted to prevent CIEC from taking decisions adverse to American interests. However, problems arose between the United States and others of the OECD that took a less intransigent position, and it was eventually abandoned.

In parallel with the playing out of these intra-IEA conflicts, the more radical elements within OPEC, Algeria in particular, appear to be using the Third World's need for a broader, more inclusive raw materials strategy in order to delay a separate oil agreement that would undercut Algerian leadership claims in the Third World. Consequently, the United States and Algeria may be, in a curious and unintended way, supporting each other in efforts to keep distance between the major oil importers and exporters. U.S. support for Israel, which generates so much hostility within the Arab members of OPEC, also affects the pace of multilateral OECD-OPEC or consumer-producer corporation.

The Algerian connection with less developed countries has potentially important ramifications for producer-consumer negotiations. In the CIEC forum, the less developed countries have thus far been loyal followers of OPEC, thanks in part to the Algerian initiative. However, increasingly some Third World countries are beginning to wonder if their support of OPEC has been repaid in concrete financial gains for themselves. High OPEC oil prices have put many of them on the road to bankruptcy. Nevertheless, the less developed countries have not seen sufficiently positive initiatives for their problems emanating from the IEA or CIEC to make a split with OPEC worthwhile. A major failure of the IEA to date has been its inability to capitalize on what some believe is wavering Third World support for OPEC.

Aside from short term diplomatic moves, there appears to be a variety of patterns of long term OECD-OPEC oil cooperation: bilateral barter deals (industrial know-how for oil); multilateral negotiations (oil prices and access to supplies and markets); and devolution of OECD (into high-cost producers and resource-poor importers) and parallel devolution of OPEC (either along conservative-radical political lines, or along large and small resource bases in relation to revenue requirements). Opportunities for the most enduring energy-based cooperative relationships may exist between the resource-poor industrial countries (Japan, France, Italy, and perhaps West Germany) and the Persian Gulf states with large reserves (Saudi Arabia and the Arab Gulf sheikdoms in particular). The development of such relationships could, however, imply a substantial departure and reorientation from historical interdependencies between these countries and the United Kingdom and, more recently, the United States.

Indeed, a special relationship has evolved between the United States and Saudi Arabia by virtue of the military cooperation and aid in industrialization, mentioned previously, and the monopoly position enjoyed by Aramco with respect to oil produced in Saudi Arabia. The American-Saudi special relationship would appear to be a major obstacle

in the way of the development of long term cooperation among the resource-poor industrial countries and the oil-rich countries of the Arabian peninsula.

Regional Energy Autarchy

The fundamental precept behind the concept of regional energy autarchy is that, instead of continued reliance on OPEC as the primary source of petroleum throughout the non-Communist world, energy self-sufficiency might be achieved on a regional basis. The most useful example of energy autarchy that has so far been substantially maintained exists among the socialist countries of Comecon. The Soviet Union has historically been the dominant oil supplier for the countries of Eastern Europe.

Western Europe has enough fossil energy resources to reduce the region's dependence on foreign supplies. Regional cooperation in energy resource development could play an important role in European economic and political integration through a strengthened European Community energy mechanism. However, the success of such large-scale regional energy development in Western Europe depends on the submergence of nationalism and the willingness of each country to pool its particular natural resources. Both past experience and current trends, however, indicate that energy policy in Europe is likely to be more divisive than unifying. Norway's decision not to join the Community and its reluctance to develop and produce its North Sea oil rapidly, Britain's narrowly conceived guardianship of its North Sea oil resources, and France's desire to be a competitor rather than a cooperator in the development of advanced nuclear technology, do not auger well for increased European energy sharing arrangements. Likewise, the long lead times and huge capital requirements needed to achieve European energy autarchy mitigate against the successful implementation of any such plan, however attractive such an achievement would be.

North America is richly endowed with the full range of energy resources, though the undeveloped reserves are high cost and located in environmentally high risk areas. Thus far, the energy crisis has been one factor among many driving Canada and the United States apart, rather than together. The development of Canadian energy resources will require enormous amounts of capital and advanced technology, with the United States the most likely source of these essential ingredients. However, the state of U.S.-Canadian energy relations leaves many unanswered questions. Is it possible that resource-rich Canada and the technology-rich United States could eventually strike a bargain as equals and cooperate to the enormous advantage of both? In parallel to the shift in political power in favor of OPEC and against OECD, has a shift occurred in favor of Canada and again away from the United States, so that Canadians can now contemplate the energy future without fear of losing their national control or identity? Canada's basic determination to phase out its oil and gas exports to the United States as rapidly as practicable in order to achieve

energy independence indicates a strong negative answer to these questions, at least for the time being.

Similar cooperation in regional energy development might be envisioned in East Asia with Japan, China, Korea, and Malaysia developing means to exploit the off-shore resources in the South and East China Seas. These areas may contain extensive oil reservoirs. However, the political obstacles, including the strategic location of Taiwan in relation to the surrounding outer continental shelf, appear insurmountable at present. Thus, such pragmatic, energy-oriented ventures seem very remote.

Turning to the Southern Hemisphere, is there a possibility of regional energy cooperation in Latin America or Sub-Saharan Africa? Despite the apparently rich resource bases in these regions, technology, capital, and management capabilities are lacking, not to mention the requisite political will. In short, although regional energy markets may assume a growing importance in the future (Brazil-Venezuela, Nigeria-Zaire), interregional trade along a North-South axis in energy and many other basic commodities will continue to be the dominant pattern. In this connection, Mexico may be an interesting test case. If recent discoveries on Mexico's outer continental shelf prove to be extensive, is Mexico more likely to export its surplus for the world market? for the U.S. market? or primarily into a Latin American regional market?

Despite assertions to the contrary by some energy advocates, there is no evidence to support the contention that new oil discoveries outside OPEC will provide a vehicle by which the IEA countries can reduce their vital dependence on OPEC oil over the next fifteen years. Nonetheless, the IEA has not systematically evaluated the implications of growing regional autarchy for the international oil market and has left unexplored a number of major possibilities for regional energy cooperation.

National Energy Autarchy

The process of industrialization and world economic development has proceeded to the point where national autarchy in energy is clearly impractical, and perhaps impossible, for most countries. China is presently thought to be a possible exception, but as mentioned previously, Eastern Europe and the Soviet Union are now largely integrated into a single energy economy (though one that is largely dependent on the Soviet Union for the bulk of its supplies).³⁵ Nevertheless, energy is such a vital and

³⁵ In fact, the Soviet Union is increasing its oil and gas exports to Western Europe at world market (OPEC) prices, thereby earning hard currencies. At the same time, East European countries are being required to import increasing volumes of oil from the Middle East at prices that are substantially higher than the price they have been paying for Soviet oil, though Soviet prices to Comecon members are being increased rapidly toward the OPEC price. The East European countries must, however, find OPEC producers willing to accept payment in soft currencies or else use their own scarce hard currency reserves for oil imports. Finally, it seems possible, if not probable, that the Soviet Union will enter the Middle East oil market in the future. For the Soviets, the ideal arrangement would essentially be oil swaps involving barter deals with

pervasive factor in an industrial economy that the case for national energy independence will be strongly urged in every country with large energy resources that have hitherto been uneconomical to develop. The case for energy independence rests primarily on the ground of security of supply, with the price for self-reliance being higher energy costs for the country concerned.

Protectionist measures—import controls, such as tariffs or quotas, and subsidized energy investments or production—must be part of a national plan to move toward energy independence. If such measures are adopted by one country in pursuit of energy security, will they work to the disadvantage of other countries or the world economy as a whole? If countries pursue energy independence individually, how will this affect the security of supply of other countries and international security generally? Yet another basic question is whether a great power which has undertaken global political-military-security commitments should be vulnerable to interruption in its basic energy supplies. Does such a vulnerability unduly diminish the credibility of its role as a great power? In particular, how does the current U.S. oil vulnerability affect U.S. security commitments to Israel and to NATO and to Japan?

These questions may go beyond the immediate domain of the IEA mandate. However, they strike at the central rationale for the existence of the IEA, and the failure of the participating countries to develop a means for considering such issues raises doubts about the longer term efficacy of the institution.

ASSESSMENT

The assumptions initially underlying the IEP Agreement were narrow. They were largely a reflection of immediate American interests during the Arab oil embargo. In order to obtain sufficiently broad-based industrial country cooperation to make the IEP worthwhile, U.S. diplomacy forged a link between industrial country energy security and economic and even military security. The United States was compelled, however, to recognize the differing interests of the participating countries and to accept a broadening of the area of agreement to include increased transparency of oil company operations, cooperation with producer countries, and the placing of U.S. domestic oil production within the emergency sharing arrangements. The U.S. diplomatic effort was successful in persuading the major OECD countries (except France, which maintained its opposition probably more because of U.S. leadership than because of substantive matters) to accept the principle of industrial country energy cooperation.

The main result of the IEA is agreement among the governments of the participating countries to respond in a coordinated manner to a pos-

one or more Middle East oil exporters to the Soviet Union and hard currency deals with West European countries importing increased volumes of Soviet oil.

sible interruption of oil imports in the future. The specified emergency measures are complicated, but complexity is inherent in any plan for allocating oil supplies available from foreign sources among a large group of countries with diverse consumption patterns and domestic production capabilities.

The details and procedural mechanisms were drafted with the 1973-74 Arab oil embargo fresh in the minds of the negotiators and with the idea of making a common response as automatic as possible. It must be asked whether such a complex procedure as is envisioned in the IEP Agreement will function smoothly or at all in an actual emergency. Nothing can be done without the close cooperation of the oil companies. While procedures for oil company cooperation can be worked out in advance, oil company behavior in an actual supply emergency will be determined by the exporters as well as the importers. If the effect of the IEA common emergency measures is to reduce the flexibility of the companies in their responses to the particular exigencies of an embargo situation, then implementation of the IEP might well increase the damage caused by the embargo to particular countries. On the other hand, in an actual emergency, the participating countries might scrap the specific procedures developed in advance and cooperatively devise an ad hoc approach tailored to meet the particular situation. Our assessment is that, although the emergency provisions have not been tested in the real world, they would probably work to mitigate the effects of a future embargo. However, the participating governments must realize that rapid improvisation is likely to be more important than an automatic response to an emergency.

The oil market information system and oil company consultation framework can serve to increase not only the transparency of oil industry operations but also the confidence of the participating countries in the "fairness" of oil industry operations. On the other hand, implementation of these aspects of the IEP may have adverse impacts on the competitiveness of the industry and may also provide an excuse for "fishing expeditions" by various participating governments with a view to developing more interventionist policies toward the private sector. Thus, the oil industry information and consultation provisions, though intended to facilitate cooperation, might generate tensions among the participating countries and between the countries and the companies.

Clearly, the United States remains IEA's staunchest supporter. It has repeatedly suggested expanding IEA's role and influence. In July 1976, the U.S. Government suggested that the time was ripe for the industrial nations to make a firm political commitment to reduce their dependence on OPEC oil and to increase supplies of all energy. Involved in this appears to be a U.S. desire to increase the international capacity for overseeing national energy policies. Under such a program, national consumption targets and production goals would become subjects for discussion in the IEA (as they used to be in the OECD Oil Committee, but to no effect). National conservation programs are already under IEA scrutiny.

While the United States clearly favors an extension of IEA functions, French efforts to erode IEA influence via the creation of an Energy Policy Committee in the OECD have been more irritating than successful. This suggests that, despite differences between IEA members, the IEA has begun to acquire an institutional life of its own.

The IEA may be a useful forum for initial discussion of proposals such as financial "safety nets" for countries especially hard hit by oil price increases and "minimum safeguard prices" for non-OPEC oil which would require additional participants and different institutional frameworks for implementation. Similarly, the IEA may have utility as a mechanism for developing a common industrial country position in any consumer-producer conference to deal with energy or energy and other raw materials. However, the IEA cannot be justified on these grounds alone.

Finally, as a framework for long term cooperation, the IEP is likely to prove no better and no worse than other similar frameworks in the past within the European Community, OECD, and NATO. Substantial cooperation implies pooling resources in joint projects. This has occasionally occurred in well-defined technological areas among a limited number of participants, but these projects have not been broadly successful in the past. Despite increasing interdependence, the nation-state system is inherently competitive, not cooperative. Likewise, competition is supposed to be the dominant mode of behavior of private firms operating in market economies. Thus, it seems unlikely that the IEA will be broadly successful either in increased pooling of energy supplies or in implementing joint research and development programs.

As circumstances have evolved, the energy cooperation of industrial countries within the IEA's Standing Group on Long-Term Cooperation, a body that includes resource-poor and high-cost producer countries, continues to depend largely on U.S. initiative. However, the direction of concern has turned around 180 degrees. At the outset, the threat was external, posed by OPEC. However, the U.S. Government has so far been incapable of gaining control over its own energy supply/demand balance and of making the decisions necessary to shape its own energy posture in a way that does not appear threatening to other industrial countries that have far fewer energy options and are far more dependent on imports for energy than is the United States. As U.S. imports rise without restraint, will the United States, with its greater ability to pay, effectively "corner" the market in world oil? Thus it is now thought that the United States itself is creating an energy problem of growing proportions for the IEA and the OECD countries generally.

Although President Ford presented to the Congress in January 1975 a package of proposals that he claimed would, if enacted, reduce American oil imports by 1 million barrels/day by the end of 1975, little of the Ford Administration's programs has been enacted as of the end of 1976. Indeed, in the late summer of 1976, U.S. oil imports reached 7.1 million barrels per day, or roughly 40 percent of U.S. consumption. In comparison to the

United States, France, Germany, and Italy have been more successful in curbing their oil imports. It remains to be seen whether the Carter Administration can, or will seriously try to, rectify the growing imbalance in the U.S. energy budget.

The IEP Agreement was developed as an industrial country defense against the OPEC cartel. With the IEA in place, the OECD industrial countries have two main courses of action open: bargaining among OECD members over a common energy policy, recognizing the disparities in their various energy capabilities; and competition among OECD countries for supplies of Middle East oil. The latter course, if chosen or entered into because of inability to choose a different energy path, could prove to be extremely destabilizing.

Finally, the emergence in time of an OPEC-OECD accommodation on oil and energy generally is possible. Whatever else happens, in view of the risks and costs in every other direction, the possibilities for such an accommodation merit serious exploration.

HOPES AND LOOPHOLES IN THE 1974 DEFINITION OF AGGRESSION *

By Julius Stone **

I.

Central to claims made for the long "Consensus Definition" of aggression now embodied in UN General Assembly Resolution 3314,¹ is that it has "accomplished its main purpose of depriving a potential aggressor of the possibility of using juridical loopholes and pretexts to unleash aggression."² To this Soviet theme the Senegalese representative added the prophecy that "there would no longer be any loopholes in international law of which an aggressor could take advantage."³

This is so far from the realities disclosed by an examination of the definition that that remarkable text rather appears to have codified into itself (and in some respects extended) all the main "juridical loopholes and pretexts to unleash aggression" available under preexisting international law, as modified by the UN Charter. Ambitions of delegations to narrow some major loopholes were usually balanced by the inclusion of provisions demanded by other states which efficiently neutralized the clarification proposed and often produced new obscurations to boot. This is true even for the more concrete problems surrounding "armed aggression" and the legal liberty of self-defense against it. It is even truer as to the less concrete problems of "indirect" and "economic" aggression which, though not expressly mentioned in the definition, may often be affected (and further complicated) by implications from its text and from its very silences. The status of extreme-economic coercion in the form, for example, of the 1973 oil boycott and of legitimate responses to it under Article 2(4) of the Charter remains as legally problematic as ever.

Some of the "loopholes" for legal use of force by states arise, of course, as legal licenses deliberately tolerated by the Charter itself. Situations in which Security Council action is blocked by the lawful use of the great power veto in face of an exercise of the right of individual and collective

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¹ G. A. Res. 3314 (XXIX), Dec. 14, 1974. 29 GAOR, Supp. (No. 31) 142, UN Doc. A/9631 (1974), 69 AJIL 480 (1975).

² Representative of the USSR, UN Doc. A/C.6/SR.1472, at 2 (1974).

³ UN Doc. A/C.6/SR.1486, at 7 (1974).

self-defense under Article 51 are only the best known and least disputed examples. No less important, though more chronically debated, are liberties of response by the victim state to "force" or the "threat of force" used against it in violation of Article 2(4), *when such responses are not otherwise prohibited by the Charter*.

This is even apart from the plain legal impotence of any General Assembly resolution, including Resolution 3314, to impose legal obligations on members over and beyond those already imposed by the Charter or other treaties. This impotence has two sources, each in itself totally disabling. First the Consensus Definition itself explicitly preserves by several provisions whatever may be the legal position under the Charter. Both the clear and the controversial loopholes under international law and the Charter are thus emphatically kept open rather than closed by the terms of the Consensus Definition. Second, even without these provisions, it would have been clear that the supremacy of the Charter text and (with exceptions not here relevant) the incapacity of the General Assembly to impose new legal obligations on members would produce much the same effect.⁴

As to some of the "loopholes" and "pretexts," indeed, even apart from saving clauses and the question of constitutional power, the very text of the Consensus Definition embodied in Resolution 3314 remains besieged by many mutually conflicting interpretations among the states concerned, at least as grave as those which it was the ostensible object of the definition exercise to remove. So we face the paradox that the closing off of "loopholes" and "pretexts" hailed by the Soviet Union as the great achievement is precisely what the definition did *not* achieve.

This, moreover, is no mere *ex post facto* perception. On the contrary, states which joined in the consensus showed ample awareness of persisting conflicts. They often made explicit, as part of the very ritual of "consensus," that they insisted on interpretations of the text which supported their earlier positions, when others among them persisted in interpretations supporting *their* earlier positions, regardless of the head-on conflicts between them as to "correct" interpretations.

It is indeed dramatic to the point of high tragedy—or is it low comedy?—that so many of the issues on which the Consensus Definition of 1974 is silent, or builds into itself the head-on conflicts in the standpoints of states, are rather central and critical for contemporary international crises and tensions. One main object of the present article is to examine the interpretations placed on the definition by states that joined in the consensus adopting it. I have done this by reference to a number of key issues central to the struggle for peaceful adjustment—this, after all, rather than draft refinements, being the context in which the Consensus Definition is

⁴ For a fuller discussion of these aspects, see STONE, *CONFLICT THROUGH CONSENSUS, UNITED NATIONS APPROACHES TO AGGRESSION*, Ch. 3 (forthcoming, 1977) (hereinafter cited as STONE, *CONFLICT*). The main provisions of the definition expressly deferring to the UN Charter include paragraphs 2 and 4 of the Preamble and Articles 2, 4, and 6. See Section X *infra* for discussion.

to be judged. On most points, a comparison of *the conflicting interpretations after adoption* with the conflicting state positions *which had previously blocked consensus* will indicate the respects and extent to which the Consensus Definition merely built the conflicts into itself rather than resolved them. This will show (which is perhaps only the other side of the same coin) how far the "consensus" is a useful means towards peaceful adjustment on critical points, rather than a means of freezing these conflicts, or even reinforcing them, thus leading to an even more severe level of confrontation.

It is fair to choose, for exposing the preexisting conflicts of position, the latest point in time before the "consensus" emerged, at which point the prospect of reaching an agreed definition still seemed slight. I have chosen for this purpose the point in the work of the Special Committee on the Question of Defining Aggression when the Soviet,⁵ thirteen-power,⁶ and six-power⁷ drafts had already been well canvassed, and when the "Consolidated Text"⁸ and its notes of persisting conflicts of state positions, based on careful reports of the Working Group and its Contact Groups, had just been presented. At that time—to which I shall here refer as the preconsensual stage—delegates were still questioning whether it was worthwhile to continue the effort.⁹ This time was also within a year or so of the adoption by the Special Committee by consensus of the present text on April 24, 1974.¹⁰

I shall, for the purpose of the above comparison, take as foci a number of matters unresolved by the definition in an order moving from the simpler to the more complex (see *infra* Sections II–VIII). In Section X, a further number of unresolved matters which arise directly from the UN Charter are discussed.

II.

ACQUISITION OR OCCUPATION OF TERRITORY AS AGGRESSION

Disputes as to frontiers escaped impact from the definition by general acquiescence. By contrast, there was sharp division among states concerning proposals that acquisition or occupation of territory by armed force should, regardless of the lawfulness of use of such force, be unlawful and barred from recognition by states.

This division was already sharply outlined at the preconsensus stage. Article 6(2) of the Consolidated Text¹¹ proposed that "[n]o territorial

⁵ Report of the Special Committee on the Question of Defining Aggression, 28 GAOR, Supp. (No. 19) 7, UN Doc. A/9019 (1973) (hereinafter cited as 1973 Report).

⁶ *Id.* 9.

⁷ *Id.* 11.

⁸ *Id.* 15.

⁹ On the even less sanguine mood in the preceding year, see Ferencz, *Defining Aggression*, 56 AJIL 491, 496, 504 ff. (1972). Cf. STONE, CONFLICT, *supra* note 4, Ch. 5, Sect. II.

¹⁰ Report of the Special Committee on the Question of Defining Aggression, 29 GAOR, Supp. (No. 19) 10, UN Doc. A/9619 (1974) (hereinafter cited as 1974 Report).

¹¹ STONE, CONFLICT, *supra* note 4, Ch. 2, Sect. II.

acquisition or special advantage resulting from aggression is lawful nor shall it be recognized as such." Sharp dissent was registered by Egypt and other states; they demanded that the words "resulting from aggression" be replaced by the words "resulting from the threat or use of force,"¹² thus giving territory absolute protection against use of armed force regardless of the legality of such use. Similarly, it was proposed that the reaffirmation in paragraph 7 of the Preamble that the territory of a state shall not be subjected to military occupation or other measures of force by another state should be amended by the omission of the phrase "in contravention of the Charter."¹³ The gist of both proposals was clearly that, even if the use of armed force were lawful, for example when used in self-defense under Article 51, all the states concerned should be guaranteed the immunity of their territory. This is the more striking since literally this protection would enure even to a territorial state which had itself resorted to the unlawful armed attack, that is, to the armed aggression which made self-defensive action necessary.

Other states (including, but not limited to, Western states) found the proposed Article 6(2) entirely acceptable as expressing the existing legal principle *ex iniuria non oritur ius* and resisted any emasculation of that principle. They pointed out, further, that this kind of provision was, in any case, concerned with the legal consequences of aggression once this is determined to have occurred, and not really with the definition of aggression. And even if legal consequences were to be regarded as relevant to definition, they did not see (turning a blind eye to Egypt's obvious collateral designs for its dispute with Israel) why territorial acquisition or military occupation alone should be singled out from many other such consequences.

All states, Oliver Wendell Holmes, Jr., once observed, are built on the blood of men. In view of the role of armed force in the origins and territorial delimitation of almost all states, the issue raised by Egypt was obviously of epochal importance. It is thus not surprising that the bid for so radical a legal change failed.¹⁴ The issue is perhaps the only important one on which the Consensus Definition did unequivocally choose between serious preconsensual conflicts in state attitudes. This failure of Egypt and other states supporting the demand that all acquisition of territory by force, even by lawful force exercised in self-defense, be forbidden represents one of the few clear legal outcomes of the 1974 definition on a disputed matter. The solution adopted favored (as already seen) the principle *ex iniuria non oritur ius*. That principle was clear, however, quite apart from the work of the Special Committee on Defining Aggression so that, al-

¹² 1973 Report, *supra* note 5, at 23. There is a deceptive implied reference here to this phrase as used in the prohibition contained in Article 2(4) of the Charter; of course, it is there *not forbidden simpliciter* but only as used "against the territorial integrity or political independence" etc. See STONE, OF LAW AND NATIONS 23-38, esp. 23 (1974).

¹³ STONE, CONFLICT, *supra* note 4, Ch. 5. ¹⁴ *Id.*

though unusual in the above respect, it did not represent a substantive achievement of the Consensus Definition.

This clear legal outcome as to acquisition or occupation of territory is, of course, reinforced by other provisions of the definition. One of these, for example, prevents anything in the definition from affecting the scope of the Security Council's powers in determining what is aggression and what measures shall be taken to deal with it (Consolidated Text, Preamble, paragraphs 2 and 4, and similarly in the final text). Another prevents the enlarging or diminishing of the scope of the Charter as to the cases in which the use of force is lawful (Consolidated Text, Article 7, and final text, Article 6).¹⁵ It nevertheless must be listed here as an example of the failure of the definition to quiet conflicts which had at an early stage blocked progress towards definition. For despite the clear confirmation by the consensus of the existing legal principle, Egypt and other states continued to advocate that their position on this matter constituted the correct interpretation of the definition after consensus. This phenomenon has been more fully described elsewhere,¹⁶ where it has been seen that the mere fact that the definition did not impugn the legal basis of occupations, such as that by Israel after 1967, could not conceal the political value to the Arab states of a number of collateral ambiguities in the language of this and other parts of the definition. The most likely forum in which this political value will emerge is, of course, the expanded General Assembly, in which "automatic" majorities are at present much subject to the influence of Arab oil and money.

III.

RELEVANCE OF INTENTION AND PURPOSE TO THE QUESTION WHETHER ACTS OF ARMED FORCE CONSTITUTE AGGRESSION

From earliest United Nations discussions (and indeed long before, under the League of Nations)¹⁷ the question of the relevance of intention and purpose to commission of aggression was a main obstacle to agreed definition.¹⁸ The Consolidated Text proposed in Article 2 that the first use of armed force in contravention of the Charter was *prima facie* evidence of an act of aggression but that the Security Council might conclude that a finding to that effect was not justified "in the light of other relevant circumstances *including, as evidence, the purposes of the States involved*" (italics supplied). The italicized words adopted the gist of the long paragraph IV of the (Western) six-power draft, which set out at length the kind of purposes in relation to the victim state which alone would render aggressive the various uses of armed force (there also listed). It was thus

¹⁵ STONE, *supra* note 12, at 18, 23.

¹⁶ STONE, *CONFLICT*, *supra* note 4, Ch. 5.

¹⁷ STONE, *AGGRESSION AND WORLD ORDER* 139 ff. (1958).

¹⁸ For a full consideration of this in relation to the 1974 definition, see STONE, *CONFLICT*, *supra* note 4, Ch. 4.

explicit that, according as the Security Council may find, the priority principle (who used armed force first?) would operate only subject to a finding as to the respective purposes and intentions of the states in conflict. Other states also supported this relevance of state purposes.¹⁹ At this pre-consensual stage the inclusion of any reference to purposes was so sharply contested that the Drafting and Contact Groups reported that "notwithstanding intensive negotiations it was not possible to find . . . a formula which would have been accepted by consensus."²⁰

The opposed position thus barring consensus at that stage was pressed by a number of states, demanding more absolute operation of the principle of priority, by omitting, for example, the words "in contravention of the Charter" as well as the words "including, as evidence, the purposes of the States involved."²¹ Egypt would also have deleted any reference to "other relevant considerations" of any kind.²² This kind of position marched, of course, with the view of Arab states which, with an eye on the politics of the Arab-Israel dispute, sought a similar absolute rule against territorial acquisition or military occupation regardless of the illegalities of state conduct.

Between this flat disagreement at the preconsensual stage and the final consensus, the Security Council's liberty to depart from the priority principle "in the light of other relevant circumstances" was maintained, but the particular express reference there to "the purposes of the States concerned" was omitted. Does this necessarily imply that "the purposes of the States concerned" should not be taken into account in determining whether acts constitute aggression? It is difficult to establish such an implication, involving as it would that the purposes of action cannot be "relevant" to such a determination. Both sides maintained that their respective and diametrically opposed positions represented the correct (and the only correct) meaning of the slightly amended Article 2 of the Consensus Definition.²³ So that on this point the definition remains subject, after the consensus, to the same conflicting state positions which had been officially reported shortly before as barring consensus; namely, whether the *prima facie* stigmatized external acts would cease to be so because of the non-aggressive intention or purpose with which they were committed. Conflicting positions blocking consensus still survive after consensus but are transmuted into conflicting interpretations of the Consensus Definition.

All this is, of course, an aggravation of other conflicts of position concealed within the apparent adoption by Article 2 of the test of priority by which that state which first commits a *prima facie* stigmatized external act is the aggressor. This text often faces intractable problems of fixing the moment in history from which priority is to be reckoned. Such problems,

¹⁹ *E.g.*, Mexico, 1973 Report, *supra* note 5, at 25. The positions of various states are considered in STONE, CONFLICT, *supra* note 4, Ch. 4, Sects. III-IV.

²⁰ 1973 Report, *supra* note 5, at 19.

²¹ *Id.*, at 23. Algerian proposal.

²² *Id.*

²³ See STONE, CONFLICT, *supra* note 4, Ch. 4, on this and related points hereafter.

along with that of relevance of purposes or intentions, are only slightly covered from view by the provision in the same article that the Security Council may hold, in the light of "other relevant circumstances," that it would not be justified in finding a *prima facie* stigmatized act to be aggression. And this same clause also covers the matter next to be considered, namely the conflict as to whether a *prima facie* stigmatized use of armed force may be excupated as a lawful response to "indirect" and especially economic aggression.²⁴

IV.

EXTREME ECONOMIC DURESS AND AGGRESSION

Whether "aggression" embraced only armed aggression as distinct from other forms of extreme coercion, for instance economic coercion, had been disputed at least since 1953.²⁵ The issue was to move to the center of the international stage with the oil boycott imposed by OPEC Arab states as a part of the Egyptian-Syrian surprise offensive against Israel in October 1973. A substantial body of states continued to press in the Special Committee for inclusion of economic aggression in the definition. It was pointed out that, even if the definition was only to deal with armed aggression, that did not mean that economic coercion did not exist or could be ignored. In particular, the fact that an alleged aggressor's use of armed force had been in response to extreme economic coercion might be held by the Security Council to be among the "other relevant circumstances" which, under Article 2 of the Consolidated Text, might lead to the conclusion that a finding of aggression was not justified.

Opposed views at that preconsensus stage, however, claimed that only armed aggression was the concern of the Security Council, that the resort to armed force was to be aggression not merely *prima facie* but *per se*. An additional clause was indeed proposed which declared that "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression" (that is, for aggression within the terms of proposed Articles 1-3, all of which refer to armed aggression).²⁶ Taken literally, such a provision might be read to exclude response to extreme economic duress as a circumstance relevant to excupation under Article 2. But such a literal reading would also negate a plea of self-defense against armed attack (supremely a "military" consideration), thus casting doubt on the literal interpretation. At the preconsensus stage of the Consolidated Text, however, there had been no decision as to the placement of such a clause.²⁷

²⁴ *Id.* Ch. 4, Sect. VII, and Ch. 7.

²⁵ *Id.*

²⁶ Now included in Article 5(1) of the Consensus Definition, *supra* note 1. See UN Docs. A/C.6/SR.1472, at 5 (M. Rydbeck, Sweden); SR.1479, at 5 (M. Petric, Yugoslavia); SR.1476, at 4 (M. Van Brusselen, Belgium) (1974). In the Special Committee, Romania proposed this as paragraph 3 of Article 1. UN Doc. A/AC.134/SR.111, at 3 (1974).

²⁷ 1973 Report, *supra* note 5, at 18.

In the Consensus Definition no express reference was made to economic aggression, and the above clause negating certain justifications was included as paragraph 1 of the rather miscellaneous Article 5. The legal outcome involved also the point that the "threat or use of force" forbidden by Article 2(4) of the Charter is not limited to *armed force*. What is very clear is that the above sharp conflicts of position at the preconsensual stage persist after consensus. In particular, it remains debated whether, if "economic aggression" provoked the first use of armed force by its victim, this circumstance would be available as a "relevant circumstance" which, under Article 2 of the text, should lead the Security Council to conclude that "a finding of aggression would not be justified." The centrality of economic factors in the prospects for increased international tension or detente, especially after the 1973 oil boycott, gives major importance to the question whether international law sets any limits to the exercise of extreme economic duress. The Consensus Definition affords not even the beginnings of a clear answer.

V.

NONSTATE ENTITIES (PEOPLES) AS AGGRESSORS OR VICTIMS OF AGGRESSION

Historically, the term "indirect" as applied to "aggression," despite the confused usage in the history, seems referable to either or both of two assumptions. One is that international aggression is a relation of state to state; a second is that armed hostilities have been used by one state against the other.²⁸ Article 1 of the Consolidated Text at the preconsensual stage adopted both these assumptions, providing that "aggression is the use of armed force . . . by a State against the sovereignty, territorial integrity or political independence of another State. . . ." ²⁹

The legal consequences of these assumptions touched some of the most sensitive nerves of Western and Third World states. So far as the *perpetrator* of aggression was concerned, Third World states, championing the right of peoples to struggle *by armed force* for self-determination, were, of course, determined that *their* use of armed force should not stigmatize *them* as aggressors—that is, that "a State" should not (for this purpose) be interpreted to include such "a people." So far as the *victim* of aggression was concerned, the same advocates were no less obviously resolved that "State" should be read to include "a people" so struggling. Western states were opposed to this latter dispensation for nonstate entities to use armed force, especially since it was proposed to extend it to any third states which chose to assist them in such armed struggles. The Soviet Union and the Soviet bloc states wished both to insist on the state-to-state requirement and to support the use of armed force in "wars of liberation."

²⁸ See on this matter, STONE, *CONFLICT*, *supra* note 4, Ch. 7.

²⁹ 1973 Report, *supra* note 5, at 16 (emphasis added).

Already at this preconsensual stage, there had been attached to Article 1 an "Explanatory Note (a)" (to remain unchanged from the Consolidated Text into the final text), which stipulated that the term "State" was used in the definition "without prejudice to questions of recognition."³⁰ However, this addition still left the main issue in conflict unresolved, for the phrase "questions of recognition" might refer merely to the question whether (the general conditions of statehood already being present) it made any difference, as between the alleged aggressor and victim states, that the one had recognized the other.³¹

After consensus had been achieved, this question, whether "peoples" (as distinct from states) had some exceptional dispensation to use armed force, remained a bitter focus of conflicting interpretations of the Consensus Definition as between the main blocs of states. The articles in relation to which these conflicting interpretations became manifest were mainly Article 7, referring to struggles for self-determination, and Article 3(g), concerning aggression by sending armed bands.³²

As to the assumption that aggression involved state-to-state *armed hostilities*, the persistence of preconsensual conflicts into conflicting interpretations of the adopted text was manifest mainly on the issue of "economic aggression" (discussed above), and on the issue of vicarious aggression through the sending of armed bands.

It is an eloquent testimony to these persisting conflicts of interpretation that the Greek and Turkish Governments each felt immediately able to invoke the impending Consensus Definition to charge the other with aggression in the Cyprus affair of 1973-74. So did the Soviet-Cuban and South African participants in connection with the struggle to establish a government for Angola in 1975-76. The equal division on the Angola issue among the states of the Organization of African Unity, immediately before the success of the Cuban intervention, illustrates dramatically the helplessness of the Consensus Definition.

As already noted, the oracular caveat in Explanatory Note (a) to Article 1 of the Consensus Definition that its use of the term "State" is "without prejudice to questions of recognition" or of membership of the United Nations brought little light to such matters. The Indonesian military activity in East Timor early in 1976, which culminated in virtual annexation, was not in *direct* conflict with any other preexisting state. It is difficult to see how Explanatory Note (a) helps *the application of this definition* as between Indonesia and the Fretilin forces struggling for independence. This is because it remains most obscure and debatable, even with Explanatory Note (a), whether and in what sense the definition is limited to state-to-state aggression.³³ And, of course, it was arguable that (as with Angola)

³⁰ *Id.*

³¹ This seems to have been how Uruguay understood the Note. *Id.*, at 27.

³² See *infra* Sects. VI and VII.

³³ For fuller examination of this difficult matter, see STONE, CONFLICT, *supra* note 4, Ch. 6, Sect. III, and Ch. 7, *passim*.

East Timor still lacked at the time of the Indonesian military intervention the stable government necessary for statehood.

VI.

SELF-DETERMINATION, WARS OF LIBERATION, AND AGGRESSION

Paragraph 6 of the Preamble of the Consolidated Text referred to "the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence." Article 5 of the same text proposed to save the right of self-determination of peoples in terms going in three respects beyond what was later to be included in Article 7 of the Consensus Definition. First, draft Article 5 explicitly reserved a people's right to use force in such struggles; second, it implied that they had a right to receive assistance from third states in this use of force; and third, this right to use force was to extend also to "peoples under military occupation." The license of "peoples" to use force against states under whose sovereignty they lived and of third states to support them in this was strongly denied by many states, especially Western states. These proposals, particularly the first two, were adamantly resisted, especially, but not only, by Western states. The Soviet Union and other Soviet bloc states, even while predictably supporting self-determination claims, were, for example, zealous in denying that anything in the definition could affect a state's right to take "police action" against dissident movements. At this preconsensual stage the Drafting Committee reported that "there is no general agreement as to the text to be adopted."³⁴

In the text which emerged on this matter in Article 7 of the Consensus Definition, all express reference to use of force by peoples under military occupation were excised, and a vague reference to their "right . . . to struggle" was substituted. The words "or to disrupt territorial integrity" were also added at the end of paragraph 6 of the Preamble.³⁵

The final result was to preserve the above preconsensual conflicts as a question of interpretation whether the right of peoples to "struggle" includes the right to use armed force against the parent state and the corresponding question as to the right of third states to support such struggles by force. The addition of the phrase "territorial integrity" to paragraph 6 of the Preamble increased this indecisiveness, since this is an attribute of sovereign states rather than of peoples "struggling" for self-determination who may, indeed, often have no defined territorial base. The new reference to territorial integrity might thus be interpreted as forbidding, rather

³⁴ 1973 Report, *supra* note 5, at 19.

³⁵ I have elsewhere examined in detail these and other changes and the conflicting interpretations still offered of them which here concern us. Both before and after consensus, there were disagreements as to the absence of *express* general reference to "indirect aggression" other than that affecting the internal government of states and as to what inference concerning this might be drawn from the texts. See STONE, CONFLICT, *supra* note 4, Chs. 6, 7.

than licensing, the use of force by third states in support of a "struggle" for self-determination against the target states. It marches with this view that the Working Group refused to attribute "sovereignty and territorial integrity" as rights of *peoples* parallel to their right of self-determination, which was saved by Article 5.³⁶

If we anticipated that the final Article 7 would leave the conflicting positions much as they were in the preconsensual stage, we would thus be profoundly correct. On no matter are the post-consensus assertions of contradictory interpretations more numerous and vociferous.³⁷ The preconsensual confrontation of those who made and those who resisted demands that insurgent peoples and supporting third states be licensed to use force was metamorphosed into a gross conflict of interpretation between states which insist that the "struggle" reserved as lawful by Article 7 of the definition includes armed struggle and others which deny this. The mere fact that words in the preliminary Consolidated Text expressly licensing force were deliberately omitted from the Consensus Definition in no way inhibited states favoring the license to use force from arguing that on a correct interpretation it was still licensed by the definition.³⁸

Claims were flatly asserted, by way of interpretations stressing various General Assembly declarations and the Explanatory Note (a) to Article 1 of the definition, that use of force by nonstate entities (and any states supporting them) against established states is always lawful in furtherance of the "inalienable right of self-determination," which some even placed on the same overriding level as the "self-defense against armed attack" provision in Article 51 of the Charter.³⁹ Communist bloc states, of course, gave strong support to the claims that force may be used in struggles for self-determination. But they also tried to secure the best of both worlds by stressing that only struggles against "colonial" or "racist" oppressors were saved by Article 7 and also (as already seen) that "police action" by an established state within its sovereign domains remained lawful.⁴⁰ The Chinese representative reduced this Soviet tactic to some degree of absurdity by designating as the relevant struggles those against "imperialist" oppression, with which he expressly associated the Soviet Union as well as the United States.

³⁶ The sixth preambular paragraph of the Consolidated Text stated the duty of states not to use armed force to deprive peoples of their right to "self-determination, freedom and independence." In the final draft of the Consensus Definition there was added, "or to disrupt the territorial integrity." This might be read to imply either that any license to support self-determination ceases at the point when such support would disrupt the territorial integrity of a state. This would support the Western view of the final Article 6. Or it might, with more difficulty, be taken to imply that a state's territorial integrity is protected only if the state complies with the right to self-determination of its peoples. For fuller discussion, see STONE, *CONFLICT*, *supra* note 4, Ch. 6, Sect. III.

³⁷ *Id.*

³⁸ For ample evidence of this, see *id.* Ch. 6, Sect. VII.

³⁹ *Id.* Ch. 6, Sect. VIII.

⁴⁰ *Id.* Ch. 6, Sects. III, VII, IX.

The stalemates and cross-purposes thus surrounding the permitted limits of "struggles" for self-determination under the definition are compounded by a whole series of further unresolved problems, on some of which judgment in a particular case is likely to depend.

First, the question *which peoples* are the beneficiaries of the saving clause in Article 7 is, as often as not, very perplexing. The revision of the draft Article 5 into what became the final Article 7 by insertion of the qualifying phrase "peoples under colonial and racist regimes or other forms of alien domination," does not resolve the doubts, for such terms as "colonialist," "racist," or "imperialist" are notoriously manipulable. If, indeed, the references to "self-determination" in the Charter and in General Assembly declarations have established some legal (as distinct from political) principle, the legal criteria for identifying a "people" having this entitlement—the "self" entitled to "determine" itself—remain at best speculative. Those who do not recognize this as a problem will do well to recall the continuing stream of violence arising from it, of which the conflicts in Katanga, Biafra, Cyprus, Angola, Lebanon, Bougainville, and Zaire are contemporary warnings.

This, moreover, is a burning issue, not only for the birth and early years of new states. It may be critical for some of the oldest and most powerful states. Thus, in the form proposed in the Consolidated Text for paragraph 6 of the Preamble and Article 5, the definition might have invited scrutiny of questions concerning the legal rights of the Baltic peoples, overrun by the Soviet Union at the opening of World War II, not to speak of Soviet armed actions against the Hungarian and Czechoslovak peoples in 1956 and 1968. And such rights might even at some time be invoked by the Welsh and Scots in the United Kingdom, Indians and Blacks in the United States, the aborigines of Australia, and the Chinese of Malaysia.

The specification "colonial and racist" will no doubt protect such Soviet adventures as long as Third World majorities in the United Nations maintain their present orientations. But persistent Chinese charges of Soviet "imperialism," as well as Soviet and satellite insistence that the Consensus Definition does not bar "police" action by a state within its own territory, indicate that the issues involved are not finally closed. They have certainly not been resolved by the equivocations of the Helsinki Declaration of 1975, despite the surrounding rhetoric.

It is, of course, a hard truth for this problem, as well as that of competing claims to self-determination which follows, that it is often the direct armed action of third states which conditions (if not actually creates) the "self" which demands "self-determination," not to speak of the "self" which succeeds. On such issues the Consensus Definition speaks with no discernible voice at all.

Second, Article 7 is directed solely to peoples oppressed by states and gives no guidance for cases (increasingly important today) of competing claims of two or more peoples for self-determination with regard to the same territory. The rights of Katangan, Biafran, and South Vietnamese

peoples are mostly water under the international bridge, whatever the merits of those outcomes. But the bloody struggle in Lebanon in 1975-76, involving local insurgency by Lebanese Leftist forces allied with Palestine Liberation forces localized in Lebanon, opposed by the Christian Rightists and also by other Palestinian forces trained in and dispatched from Syria, then by regular Syrian forces (including armor), and finally by Syrian forces acting as an Arab "peacekeeping" force, reminds us of the chronic and increasing intimacy between civil strife, wars of liberation or self-determination, and international aggression. So does the claim of the Palestine Liberation Organization to dismantle and replace the State of Israel. Here again, the Consensus Definition says little that is pertinent and plain. The controverted doctrine of the legitimacy of "wars of liberation" only adds to the confusion where, as in Lebanon, the "inalienable right of self-determination" can be equally invoked by both peoples engaged in a "struggle" to vindicate it.

Third, the problem of competing self-determinations becomes even more intractable to handling by the definition where the competing claims and accompanying military activities, punctuated by actual wars, armistices, and cease-fire agreements, *have been made over long historical periods*. We have seen that the test of priority of resort to armed force in Article 2 presupposes a fixed point in time from which priority is to be calculated.⁴¹ Does one fix the aggression in the Cyprus crisis of 1974 from the action of the Greek officers who led the coup d'état or from the Turkish response by invasion, even assuming that the 1974 crisis can be severed from the earlier struggles? Is the critical date of the Middle East crisis 1973 or 1967, or the first attack by Arab states on Israel in 1948, or is it the Balfour Declaration in 1917, or the Arab invasions and conquest of the seventh century, or even perhaps the initial Israelite conquest of the thirteenth century B.C.? The priority question, as well as the self-determination question, becomes even more baffling when, in the course of such a long timespan, a later developing nationalism arises, like the Palestinian, which claims to override retrospectively the sovereign statehood already attained by the competing people.⁴²

A fourth aggravating problem should perhaps here be added concerning the phrase "forcibly deprived" of "the right of self-determination" which in Article 7 now delimits the range of peoples entitled to "struggle" for self-determination under that article. It corresponds to the recital in paragraph 6 of the Preamble of "the duty of States not to use armed force to deprive peoples of their self-determination." Does "forcible deprivation" refer only to future or at least contemporary acts? Or does it embrace all such deprivations which have occurred, at however remote a time, in the establishment of a state now existing? Considering that most, if not all, well-established states have been founded by armed force, if not by conquest, commonsense would indicate the need for some statute of limitations. But, of course, one of the most current assumptions among Third World

⁴¹ *Id.* Ch. 1, Sect. VI.

⁴² *Id.* Ch. 5.

states is that a state exercising sovereignty over a people seeking self-determination within its territory, even if it has done so for centuries, must be deemed to be in a continuous state of armed attack against that people and forcibly depriving it of its self-determination. The theorem proposes that such a state be deemed in law to be in a standing condition of armed aggression, thus giving the people concerned and supporting third states the license to use armed force in individual or collective self-defense. It presents one basis for the interpretation of "struggle" in Article 7 to include the use of armed force.

VII.

AGGRESSION AND ATTACK BY ARMED BANDS AND VOLUNTEERS

The story of efforts to outlaw "war" has, ever since the League of Nations, been marked by various devices of states for evading the legal precepts. Not least among these has been the concealment of a state's resort to use of armed force by making this resort vicarious or by claiming that the persons acting are only "volunteers" and not part of its armed forces. The modern history of such resorts include post-World War I counter-revolutionary moves against the Soviet Government; the "volunteers" on both sides in the Spanish Civil War; the intervention of Chinese "volunteers" in the Korean War; the equipment and support by Arab states of terrorist bands later featured as a miscellany of "military arms" of "the Palestine Liberation Organization"; the sending of Soviet civilians to support the armed forces of one or other of the Arab states from 1967 to the present time; and Cuban and Soviet support for the leftist contenders for control of Angola in 1976.

Certainly, all engaged in the enterprise of definition were sharply aware of the need to clarify, cutting through fictions and evasions, at what point responsibility for armed aggression would attach to a state thus acting vicariously. Prior to and apart from the Consensus Definition, international law attributed delinquency to a state which knowingly harbored armed bands in its territory or sent them to operate against a neighboring state. It gave to the victim state rights of self-help, extending to entry into the culprit's territory (at least in hot pursuit) to abate the depredations, if the harboring state was not willing or able to do so.

The provision in Article 3(g) of the Consolidated Text, listing the sending of armed bands against another state as an act of aggression, was somewhat more permissive toward alleged aggressors than these rules of traditional international law and many past proposals on the matter made, for instance, by the Soviet Union. It apparently reduced the guilty activities from organizing, encouraging, assisting, or sending armed bands to merely that of "sending." Even then it qualified the range of guilt by requiring that the resulting acts of armed force against the target state must be "of such gravity as to amount to the other acts of aggression listed

above in the definition." (This has a rather circular ring to it.) The final words of Article 3(g) "or its open and active participation therein" created further doubts as to whether, indeed, activities other than "sending" might be caught in certain circumstances.

At this preconsensual stage, state positions were in head-on conflict. Some pressed to expand the range of guilty activities. Indonesia wanted to include "support" as well as "open and active participation."⁴³ The United States wished to stigmatize not only the sending but also the organization of, encouragement of the organization of, assistance to, and knowing acquiescence in the activities of not only armed bands, groups, irregulars, or mercenaries but also "volunteers."⁴⁴ Guyana would have included "organizing and supporting" as well as "sending,"⁴⁵ as would Uruguay.⁴⁶ And there were other objections that Article 3(g) was "too narrow and omitted acts which should be covered."⁴⁷ Other states, on the contrary, wanted further to emasculate Article 3(g). There were objections to the stigmatization of "open and active participation therein" at the end of the article. Syria, Iraq, and Egypt (like the "non-aligned" thirteen-power draft) urged that this activity should be removed from the list of acts of aggression and be declared to be—in a neutral way—a mere "breach of the peace." Algeria approached the same objective more obliquely by asking that the saving clause for self-determination "struggle" (later to be embodied in Article 7) be framed in terms expressly overriding the "armed bands" stigmatization in Article 3(g).

At the preconsensual stage,⁴⁸ therefore, the Drafting and Contact Committees understandably observed that there was no general agreement on the text they offered.⁴⁹ In the text which achieved consensus, the confrontation between self-determination "struggle" and the stigmatization of the sending of armed bands was preserved, but concealed. On the one hand, Article 7 did contain a clause that Article 3 as a whole (*not merely Article 3(g)*) should not derogate from the right to struggle for self-determination stated in Article 7. Superficially this was a concession to the Algerian-type of proposal that the liberty to engage in self-determination struggle should override the duty not to send armed bands in Article 3(g). Insofar, however, as Article 7 now derogated from the whole of Article 3, and not merely from Article 3(g), the effect of interpreting the word "struggle" to include armed struggle would be to license the commission of all the principal types of acts of aggression listed in Article 3. To avoid this result, the meaning of "struggle" had to be limited. And this appears to have been sought by deleting from the final Article 7 any explicit license for use of force in self-determination "struggle." Thus the Algerian proposal was adopted in form *but rejected in substance*, and the issue as to the licitness of armed force in self-determination struggles was turned into

⁴³ 1973 Report, *supra* note 5, at 22.

⁴⁴ *Id.*, at 23.

⁴⁵ *Id.*, at 24.

⁴⁶ *Id.*, at 26.

⁴⁷ Comment of the Contacts and Drafting Groups, *id.*, at 19.

⁴⁸ *Id.*, at 23.

⁴⁹ *Id.*, at 19.

conflicting interpretations of the word "struggle" in Article 7 (already summarized in Section VI above).

In sum, therefore, what the 1974 definition contributed on aggression in the form of sending "armed bands" was a somewhat emasculated statement of the rule of international law, beclouded, however, by the tendentious and disputed proviso in Article 7 concerning the right of "a people" to "struggle" for self-determination and of third states to give it support. On no issue of interpretation were the states joining in the consensus more starkly at odds than on whether the word "struggle" in Article 7 is to be read to include the use of armed bands contrary to Article 3(g).

The effect of so reading it would be to neutralize, for most practical purposes, the express stigmatization as aggression of such use of armed bands in Article 3(g). We have given reasons elsewhere for thinking this self-frustrating and rather untenable.⁵⁰ But the fact that the Consensus Definition makes the point seem even arguable gives for the future a certain spurious *political* legitimacy to devices of indirect armed aggression which the preexisting rule of international law condemned as unlawful. Here, as elsewhere, loopholes and pretexts were extended rather than closed off. While objections to the *limited* references to indirect aggression were dominant in the preconsensual discussions in this area, the theme which dominated the post-consensus statements was the inadequacy of express provisions concerning it.

VIII.

AGGRESSION IN RELATION TO DISPUTED TERRITORY AND MARITIME AND OTHER DOMAINS

The limitations of the notion of aggression in relation to boundaries have long been recognized, for the earliest notions of aggression were centered on the armed crossing of frontiers. The limitations arise from the fact that, where frontiers are disputed, both sides can claim to be acting within their own domains. There is here the initial paradox that while the most simple and intuitively felt notion of aggression is armed trespass across a frontier, it has also long been agreed that this notion is not helpful when the frontier line is in debate. While it is thus recognized that the test of crossing of frontiers is inadequate, this should not blind us to the fact that resort to armed force over disputed frontiers remains a cardinal form of contemporary conflict.

Contemporary trends, indeed, may tend to increase rather than decrease the spread and gravity of conflicts both as to the territorial and marine entitlements of states. Thus, the states of Black Africa, now that the first stage of liberating nationalisms and decolonization is almost over, are likely to become increasingly restless within the pencil and ruler boundaries so debonairly drawn by the Congress of Berlin in 1878. Lines which

⁵⁰ STONE, *CONFLICT*, *supra* note 4, Ch. 2, Sect. II, and Ch. 6.

thus often ignore tribal, geographical, strategic, and economic function are likely to come into controversy as the united front against Western colonialism yields to concern with questions internal to the Black African region. Even the existence of an original treaty basis for the frontiers later accepted by newly established Black African states gives no assurance against future disputes. The treaty basis of Sino-Indian frontiers, which had been stable for a half-century, did not prevent the People's Republic of China, on the basis of nascent doctrines about unequal treaties and treaties made under duress, from bringing those frontiers to unpleasant life in the 'sixties. As Somalia-Ethiopia, Angola-Zaire, and other current tensions indicate, tribal division, restlessness, and irredentism may yet make the doctrines of "unequal treaties" and "wars of liberation" as powerful in political warfare among Black African states.⁵¹ President Amin of Uganda was already playing the overture to this phase, even as the problems of Southern Africa remained unsolved. He has made major territorial claims against both Kenya and the Sudan, to which he added that Uganda had at present no intention to make war on those neighbors, but merely to point to the mistakes of the former British ruler in fixing the Kenya-Uganda frontiers.

The Consensus Definition, it was agreed on all hands, reduces not at all the problem of determining when there has been aggression in connection with disputes over boundaries, and there was no serious division of opinion about this matter either before or after consensus was achieved. What is clear by silence and by inferences drawn by some from Explanatory Note (a) to Article 1, explaining that the word "State" is used "without prejudice to questions of recognition" as to land frontiers, was also made clear as to maritime entitlements by express caveat to the definition. This caveat declared that the provisions of the definition were without prejudice to the rights of littoral states to act in waters within their national jurisdiction in conformity with the UN Charter.⁵² The effect is, of course, that armed actions such as those of Iceland in vindication of its disputed claims of national jurisdiction in a widened exclusive fishing zone (as well as reasonable responses thereto by other states such as the United Kingdom) are not affected one way or the other by the contents of the definition. Apart, therefore, from any restraints or controls arising from the Charter or other treaties binding the parties, armed action arising from this conflict as to maritime frontiers is left to customary arbitrations of negotiated agreement or force. A whole range of conflicts, solutions to which still escape the Third UN Conference on the Law of the Sea, is similarly out of reach of the Consensus Definition.⁵³

This close bearing of a definition of aggression on the momentous issues of planetary distribution of the various regions and uses of the oceans and

⁵¹ *Id.*, Ch. 1, Sect. III.

⁵² See Report of the Sixth Committee, UN Doc. A/9890, para. 10 (1974) and *cf. id.* para. 9 as to the blockade of landlocked states.

⁵³ STONE, CONFLICTS, *supra* note 4, Ch. 8.

the resources they contain (not to speak of the uses and resources of continental shelves and the ocean bed) points to a deeper meaning of the task and its difficulty. In both its aspiration and political warfare aspects, the undertaking is a demand for global redistribution of powers and resources now enjoyed by the respective states in the legal and economic status quo. A definition which forbids the use of kinds of coercion by which alone particular states or groups of states can assure the security of their rights and legitimate interests under the existing order exposes those rights and interests to appropriation by others. Maneuvering for a definitional text which will advance the proponent state's self-interest and strike at its adversary's is thus a central socio-political reality, side by side with noble aspirations for a more peaceful world in which there is a juster distribution among states and peoples. It was to be expected that states whose rights and interests seem thus exposed by a particular text will resist that text and the redistribution which it threatens. No less clearly other states, to whom such rights and interests are exposed by the definition, may support and press them. Still other states will be uncertain about the effect of a text on *their* rights and interests and will prefer a text which by silence or ambiguity leaves them escape hatches in future, but now unforeseeable circumstances.

When what is at stake in the plausibly simple call for definition now turns out to be a kind of planet-wide legislative redistribution of powers and resources among the 145 states of the world, we should not expect any easy success from the Special Committee. Such a success, far from being achievable by "finding" a definition of aggression calls rather, first of all, for a review of all the major existing legal precepts and institutions of international society—in short, an examination of the existing legally supported politico-economic order. What this requires is a consensus not so much about phrases in a definition as about the norms of minimal justice among mankind which would control and guide this reform of the existing law in various situations. I have examined at length the available approaches to these norms of justice and the special difficulties of approaching them in international rather than municipal contexts.⁵⁴ Certainly such a comprehensive global reform cannot be approached as a mere byproduct of an exercise in definition of aggression, however skillful, cunning, and wise the draftsmen and diplomats whose labors produced it.

IX.

DIPLOMATIC ORATORY AND SCHOLARLY DREAMS

This stocktaking of vital matters unresolved by the 1974 definition, is, I hope, a sufficient comment on the diplomatic claims, quoted at the start

⁵⁴ Stone, *Approaches to the Notion of International Justice*, in R. A. FALK & C. E. BLACK, *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER*, Ch. 8 (1969); and see generally STONE, *CONFLICTS*, *supra* note 4, Ch. 8.

of Section I, that the "loopholes in international law" for aggressors have been closed. Claims of this nature, concealing the power-political realities behind the language of peace-directed idealism, when they proceed from representatives of states, may be but tactful expressions, filling oratorical time without impairing or committing state interests. They may also be an oblique salute to the expected value to states concerned of built-in ambiguities as future political weapons. It is far less easy to understand such concealments in serious scholarly analysis.

Among the most diligent running commentaries on the work of the Special Committee have been those of Benjamin B. Ferencz. They have been notable for their important insights, as well as for an optimism which verges sometimes on wishfulness.⁵⁵ His account after the achievement of the Consensus Definition brings both these qualities to a striking level.⁵⁶

Mr. Ferencz climaxed his own chronicling of the negotiations with an overall analysis, article by article, of the text which finally emerged. He there acknowledged that others may criticize the definition on the following grounds: (1) "Consensus" had too often not signified "agreement," but merely that states "have refrained from voicing their doubts and their objections." (2) The ambiguities, omissions, and internal inconsistencies of the definition make it subject to conflicting interpretations on very critical matters. (3) Any guidance which it might provide has, in any case, no binding effect on the Security Council (or, as one might add, on anyone else).⁵⁷

The learned author is nevertheless concerned, in the end, to defend the Consensus Definition. The main gist of his defense is that the definition cannot be disregarded, that its norms will tend to become binding norms, that they will deter national leaders from breach of them, and will enable "the public" better to understand the actions of states in relation to peace. All this is almost in the same breath as he had just chastened the silences, ambiguities, internal inconsistencies, and built-in conflicts of interpretations on decisively critical matters. Such being the text, the praise can at best amount to little; and if we envisage (as we must) that these shortcomings may sharpen the weapons of future political warfare, praise might turn into warnings about new temptations for potential aggressors. Indeed, the author himself almost steps back to make this self-correction but scarcely sufficiently so. The definition, he says, reflects both the adhesion of old nations to traditional values and defense of their positions and the brandishing of fledgling sovereignty by new nations demanding equality and justice. It reflects the fears and doubts of an unevenly de-

⁵⁵ Ferencz, *Defining Aggression: Where It Stands and Where It's Going*, 66 AJIL 491 (1972); *A Proposed Definition of Aggression by Compromise*, 2 INT. & COMP. L. Q. 407 (1973); *Defining Aggression—The Last Mile*, 12 COL. J. TRANSNATIONAL L. 430 (1973).

⁵⁶ B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE* (1975). Volume Two consists of a commentary (pp. 19-76) and the texts of various UN documents (pp. 79-614). Volume One similarly introduces and collects the documents of the League period.

⁵⁷ 2 *id.* 51.

veloped community of nations, with short term gain often preferred to long term survival. "Terrorism, the killing of diplomats and use of armed force . . . are, in some parts, of the world defended as legitimate means for attaining legitimate goals, while elsewhere they are condemned as the most atrocious of crimes."⁵⁸ And on his own account, the states adopting these violently contradictory positions on such matters can still invoke the Consensus Definition to support them.

Mr. Ferencz is thus really unable to show that any features of the Consensus Definition have relieved the world to any degree of this and other aspects of harsh reality. His reflections lead him back to the generality that "definition, codification, adjudication and enforcement are all essential steps towards a rule of law," that all of these depend on common acceptance by states, and that "fear of failure is no excuse for inaction."⁵⁹ But even if we were to agree that "definition" *in general* is a first step to "the rule of law," that still does not cancel the fact that the central provisions of this so-called "Consensus Definition" are, even by his own criteria, but *an agreement on phrases with no agreement as to their meaning*.

We can perhaps acquiesce in Mr. Ferencz's final thought that the consensus definition, "despite all its imperfections, is . . . a visible re-affirmation of the indomitable hope . . . that there must be legal limits to the use of armed force." But this is only because, like most of mankind, we would still applaud this indomitable hope, even though the Consensus Definition had done nothing to advance it. For the fact remains that, even after making full allowance for diplomatic understatement or hyperbole, the discrepancies between the achievements claimed for the Consensus Definition and the gross functional inadequacies revealed by objective examination of it are extraordinary.

X.

POLITICAL WARFARE, UN FACESAVING, AND THE HEGEMONY OF THE GENERAL ASSEMBLY

We have been comparing the conflicting attitudes of states concerning what conduct should be stigmatized as aggression, which at first blocked achievement of the Consensus Definition, with the position as to these same matters after its achievement. Evaluating the claims made for the Consensus Definition, mentioned at the beginning of this article, also involves a consideration of doubts and uncertainties as well as conflicts. To have substance, the claims made for the Consensus Definition (for instance, as to deterring aggressors, enlightening states, or guiding UN organs) would require the elimination, or at least substantial reduction, of the many chronic doubts and uncertainties concerning the Charter provisions as to the limits of lawful use of force and the powers of UN organs in relation thereto.

⁵⁸ *Id.* 52.

⁵⁹ *Id.*

Without seeking to exhaust the list, some of these may here be brought to mind:

(a) Article 2(4), forbidding certain kinds (what kinds?) of "threat or use of force."

(b) Articles 10-12, giving the General Assembly certain powers (what powers?) to discuss and make recommendations on questions relating to the maintenance of international peace and security, subject to certain limitations (what limitations?) vis-à-vis the otherwise exclusive or at least legally superior powers of decision concerning the use of force mentioned in paragraphs (c), (d), and (e) here immediately following.

(c) Article 24, giving the Security Council "primary responsibility" (what other body, if any, has secondary, or other, responsibility?) for the maintenance of international peace and security.

(d) Article 25, by which members agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. (Does this refer only to decisions under Chapters VI, VII, VIII, and XII, referred to in Article 24, or, as the International Court of Justice advised in the *Namibia* case,⁶⁰ to any resolutions which the Security Council is competent to adopt?)

(e) Article 39, empowering the Security Council to determine "the existence of a threat to the peace, breach of the peace, or act of aggression." (What is the relation of each of these terms to the kind of "threat or use of force" prohibited in Article 2(4)?)

(f) Chronic doubts also surround Article 51 which, at the end of the Chapter on peace enforcement, makes an overriding reservation to states of "the inherent right of individual and collective self-defense . . ." (What is the relation of the terms "threat or use of force" in Article 2(4) and "threat to the peace, breach of the peace, or act of aggression" in Article 39 to the "armed attack on a Member of the United Nations" in Article 51?)

(g) In this same Article 51, do the words "if an armed attack occurs" mean "after an armed attack occurs" so that target states must wait to receive the first blow, however dire (as in nuclear warfare) the consequences, before they can lawfully act in self-defense—the problem of "the sitting duck"? Or do those words merely describe the kind of peril against which they are entitled, even in advance of its appearance, to take self-defensive action—the converse problem of anticipatory self-defense.

It is extraordinary that, among states so *parti pris* and articulate on other critical matters, little or no interest was shown at the committee session which produced the Consolidated Text in this vast jungle of legal uncertainties surrounding the basic Charter provisions.⁶¹ Article 7 of the Consolidated Text (which was left untouched in Article 6 of the Consensus Definition) provided that "[n]othing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including

⁶⁰ [1971] ICJ REP. 53, 58.

⁶¹ For a fuller discussion of the relation of the 1974 definition to the Charter in the above and other aspects, see STONE, *CONFLICT*, *supra* note 4, Chs. 1, 3, *passim*.

its provisions concerning cases in which the use of force is lawful." Only one proposal relevant to it, that of Uruguay, was recorded by the Working Group.⁶²

This comparative lack of interest in the removal of the plague of legal uncertainties surrounding the Charter provisions is indeed strange if we assume that the participants even at this preconsensual stage were mainly driven forward by the aim of providing states and UN organs with guidance of precision and clarity as to the limits of the lawful use of force.

This strangeness, however, is tied to the assumption that the major drive of the enterprise, at this stage, was towards precision and clarity of the law. To escape from it we have to test this assumption and, perhaps, seek other hypotheses as to what the drive was. Two possibilities present themselves. One is that participant states were at this stage primarily concerned not with any beneficial effect of greater precision and clarity in controlling force between states or guiding UN organs, but rather to maximize the value of the definition to themselves as an instrument to be invoked in support of their own political objectives, or to minimize its value as an instrument invoked by others against themselves. On this alternative hypothesis the definition is envisaged, above all, as an instrument of political warfare. Insofar as a state could not secure acceptance of the definitional terms which thus optimize its own political interests, the political warfare drive was at any rate to neutralize any prejudicial effect of the terms on its interests. *For this latter purpose* precision, clarity, and the closing of loopholes, far from being necessary, were on the whole undesirable, at any rate if any substantial price had to be paid therefor. What was rather sought was the continued availability of loopholes or pretexts upon which states could fasten to support their own national policies, or attack those of their adversaries, in suitable forums. And, of course, for Third World and Communist states (and in particular for the dominating Arab bloc), the forum most in view was the General Assembly with its so-called "automatic majorities" on a wide range of global questions.

The other possible drive, extraneous to that of peaceseeking, may be called that of United Nations verbal celebration or facesaving. It has to be seen against the background of repeated failures in the preceding quarter-century of UN efforts to define aggression, following those of the earlier League era. By 1972, similar failure also threatened the Special Committee. A success for the United Nations this time would not only save face, but be all the more impressive in view of so many earlier failures. The tendency of this drive was to find forms of words which were ambiguous so far as they referred to the most serious conflicts in state attitudes or to avoid referring to such conflicts altogether. Clarity and precision were therefore qualities to be avoided rather than sought, for to seek them would have destroyed even the superficial verbal level of consensus. This,

⁶² 1973 Report, *supra* note 5, at 27.

perhaps, is the true "fragility" which the architects of the "consensus" were so desperate to protect.⁶³

Still another objective of some states was that of extending the General Assembly's influence, as against that of the Security Council, in matters of maintaining, restoring, and enforcing international peace and security. The constant pressure of the Group of 77 (counted at 110 at the 1976 UNCTAD Conference) for further expansion of independent General Assembly activity and for pressure by the Assembly on the Security Council in particular matters has become a contemporary commonplace. The new definition of aggression (as here repeatedly seen) has surrounded the whole area of peace enforcement with an ever denser entanglement of doubts and ideologically and economically based conflicts of interpretation about the limits of lawful use of force. Correspondingly, there is likely to be a continuing if not an increasing shortfall of Security Council performance in this area and therefore room for extension of the General Assembly's activity by analogy with that under the Uniting for Peace resolution after 1950. For this objective, as for the general political warfare objective, lack of precision and clarity may be an advantage rather than otherwise. What is necessary is merely that any ambiguities and confusions are tolerant of the proponents' own *parti pris*. Once that is achieved, states pressing for expansion of the General Assembly's powers could expect that the viewpoint which they favor would be supported by the "automatic majorities" on which they can now rely on many conflicts, especially with Western states.

⁶³ For fuller elaboration of these extraneous goals for which the 1974 definition may have importance, see STONE, *CONFLICT*, *supra* note 4, especially Ch. 9, Sect. X, and Ch. 10, Sects. IX, X.

THE THIRD UNITED NATIONS CONFERENCE
ON THE LAW OF THE SEA:
THE 1976 NEW YORK SESSIONS *

*By Bernard H. Oxman ***

The law of the sea has changed, for good or for ill. The Revised Single Negotiating Text¹ (hereinafter RSNT) issued in the spring of 1976 may prove to be the single most important document regarding the law of the sea since the 1958 Geneva Conventions in terms of its influence on state practice, whether by way of an ultimate treaty or otherwise. Important differences will exist regarding the extent to which portions of the text are declaratory of emerging customary international law and regarding the extent to which the text must be changed to be acceptable as a universal treaty or as customary law. Indeed, difficult questions of implementation of its principles in bilateral and other arrangements are already arising. Positions taken at multilateral conferences may differ from the positions taken in other contexts. But the text will not be ignored.

Should the Conference ultimately be unable to reach agreement on a treaty, this circumstance will be one of the great ironies in the history of codification and progressive development of international law. It is readily apparent to the participants that this Conference has already achieved agreement in principle on issues that could not be resolved at the earlier Hague and Geneva Conferences and on fundamental legal questions of environmental protection that were not even faced at the earlier conferences. Some of these issues have caused serious difficulties in international relations for some time. Yet the chances for a widely acceptable treaty are in jeopardy in large measure because of fundamental political disagreement over mining of deep seabed manganese nodules—an activity that has yet to begin; that by the end of the century may account for little more than a dozen mine sites out of an area that is nearly half the size of the planet; and that is likely to have less immediate effect on the basic interests of most states than other activities dealt with in the text. In economic terms alone, the irony is apparent if one considers that the Con-

* This article is a sequel to Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AJIL 1 (1974); *The Third United Nations Conference on the Law of the Sea: the 1974 Caracas Session*, 69 AJIL 1 (1975); and *The Third United Nations Conference on the Law of the Sea: the 1975 Geneva Session*, 69 AJIL 763 (1975).

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¹ Revised Single Negotiating Text, U.N. Doc. A/CONF.62/WP.8/Rev.1, May 6, 1976 (hereinafter RSNT).

ference has reached virtual agreement on the disposition of all the living resources of the sea and virtually all of the hydrocarbon resources of the sea—major and growing parts of the world's supply of animal protein, energy, and petrochemicals.

The third substantive session of the Conference was held in New York from March 15 to May 7, 1976. Following the same procedure used for the single negotiating text (SNT),² the Chairmen of the three Main Committees prepared revised single negotiating texts (RSNT)³ and the President prepared a single negotiating text on settlement of disputes.⁴ Significant changes were made in the Committee I text on deep seabeds and in the Committee III texts on scientific research and protection of the marine environment. The Committee II texts, which commanded very broad support in general, were refined in some respects.

The fourth substantive session was held in New York from August 2 to September 10, 1976. The Chairmen of the Main Committees issued detailed reports,⁵ but no newly revised texts. The President issued a revised text on dispute settlement after the session,⁶ thus bringing the text on that subject to the same stage as the others. The Conference recommended that another session be held in New York commencing in May 1977. It favored devoting the first three weeks of that session principally to Committee I problems, and subsequent completion of a consolidated text of the entire draft treaty by the President of the Conference. Discussion was deferred on the final articles (entry into force, etc.) and on the report of the Secretary General on this matter.⁷

Many delegations insisted that the next session of the Conference must be decisive. Representatives of some of the developing countries in particular noted the limited manpower and resources at their disposal for participation in a variety of international negotiations. This consideration raises interesting questions of procedure, not only regarding the possibilities for agreement, but also as to the weight to be accorded to a text both in the negotiations and otherwise.

The Conference normally functions by consensus. It has not voted on or approved a single article. The consensus procedure is considered necessary to achieve widespread agreement on what can truly be regarded as universal law. The inherent significance of the RSNT depends on the degree to which the Chairmen have correctly perceived the basis for

² Informal Single Negotiating Text, UN Doc. A/CONF.62/WP.8, May 7, 1975; reprinted at 14 ILM 682 (1975). See also Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: the 1975 Geneva Session*, 69 AJIL 763-64 (1975).

³ Note 1, *supra*.

⁴ UN Doc. A/CONF.62/WP.9/Rev.1, May 6, 1976. 15 ILM 61 (1976).

⁵ UN Doc. A/CONF.62/L.16 (Committee I), L.17 (Committee II), L.18 (Committee III), Sept. 16, 1976.

⁶ UN Doc. A/CONF.62/WP.9/Rev.2, Nov. 23, 1976.

⁷ UN Doc. A/CONF.62/L.13, July 26, 1976.

agreement and balanced the conflicting interests at play.⁸ Its ultimate significance depends on the degree to which it is respected either in the process of completing a treaty or in the absence of a widely ratified treaty. To the extent that the Chairmen's perceptions are correct, it is a fair guess that fundamental changes either at the Conference or in state practice may doom the prospects for any true international law of the sea, conventional or customary, for a generation or more.

This is not the place to predict whether a concert of maritime powers, or any other group, could have its way without a treaty, on the speculative assumption that the relevant groups could unite in practice. The likely result would probably depend on the issue. But a contest for power does not make law simply because the contestants pronounce legal conclusions to justify their actions, or because their apologists really do believe that they are correct. In functional terms, law will only emerge once there is a clear victory, or the contest is resolved by agreement, formal or informal. The significant question facing states in deciding on the benefits and costs of a treaty has less to do with the oceans or the specific rules of law than with their perception of the kind of world in which they want to live and the role of law in such a world.

The basic structure of the law of the sea in the RSNT is essentially the same as in the original single negotiating text.⁹ Two basic groups of issues

⁸ The Introductory Note to the RSNT by the President of the Conference concludes:

The President presents these texts to the Conference as a procedural device to carry forward the process of negotiation in the expectation and the hope that the future negotiations will help towards the attainment of general agreement in keeping with the letter and spirit of the "Gentleman's Agreement" regarding the conclusion of a Treaty or a Convention by consensus.

The text of the "Gentleman's Agreement" can be found in the Appendix to the Rules of Procedure of the Conference, UN Doc. A/CONF.62/30/Rev.2.

⁹ The following ten points were elaborated in Stevenson & Oxman, *supra* note 2; at 764-65:

(1) a maximum 12-mile limit for the territorial sea, over which the coastal state will have sovereignty, subject to a right of innocent passage, with some elaboration of the rules of innocent passage;

(2) unimpeded passage of straits used for international navigation for all vessels and aircraft;

(3) a 200-mile economic zone in which the coastal state exercises sovereign rights over the exploration, exploitation, conservation, and management of living and nonliving resources and in which all states continue to enjoy freedoms, in particular of navigation and overflight and other uses related to navigation and communication; coastal state sovereign rights over the exploration and exploitation of the resources of the seabed and subsoil of the continental margin where it extends beyond 200 miles, coupled with a duty to contribute some international payments in respect of mineral production in the area of the margin beyond 200 miles;

(4) comprehensive coastal state control of all drilling and of all economic installations in the economic zone;

(5) some adjustment and modernization of the regime of the high seas, for example the recognition of the special interest and responsibility of the state of origin for anadromous species of fish and new rules with respect to control of unauthorized broadcasting and cooperation in the suppression of illicit traffic in narcotics;

(6) an elaboration of a concept of island nations as archipelagic states which includes a precise definition of a new category of archipelagic waters and a regime of unimpeded passage through archipelagic sealanes and air routes that traverse the archipelago;

are outstanding, although other problems remain. The first concerns the work of Committee I—the international regime and machinery regarding the exploitation of deep seabed minerals. The second concerns a number of unresolved issues regarding the 200-mile economic zone—the juridical status of the zone, the access of landlocked and geographically disadvantaged states to fisheries in the zones of their neighbors, related problems of the continental margin where it extends beyond 200-miles, scientific research in the zone, delimitation between opposite and adjacent states, and the application of third-party procedures to disputes regarding the zone.

By its very nature, the work on the international regime for the deep seabeds is not as likely to have a direct impact on the development of customary law as much of the rest of the work of the Conference. The centerpiece of that regime would be a new international organization that could only be created by agreement. Nevertheless, the fact that this part of the negotiation constitutes the greatest obstacle to a treaty has significance for the general development of international law by global multilateral negotiations. It is open to question whether the “codification and progressive development” of international law ever fell victim to big power rivalries to quite the extent that this process has been hampered by the newer North-South differences. What must be noted is not merely that certain differences between industrialized and developing countries may need to be addressed in the course of resolving the relevant legal problems, but that the negotiations have been seized as an occasion to press these differences in a display of group unity. In a sense, the law is being held hostage.

On the other hand, work on the economic zone is likely to have great impact on unilateral state practice. This is already becoming clear. The significant point is not merely that coastal states are making claims based in large measure on the texts, but that these claims (like the texts) seek to accommodate the interests of others, and that other states are accommodating to the claims. It is impossible to say that this would not have occurred in the absence of the negotiations, but the negotiation of common principles certainly facilitated the process. Considering the vast areas and major interests involved, the importance of paving the way for peaceful change cannot be dismissed lightly. The key question of course is whether the accommodations will last or whether coastal states in particular will seek more in the future.

(7) international standards to prevent and control marine pollution, and limited coastal state enforcement rights with respect to vessel-source pollution;

(8) specified coastal state and flag state rights and duties with respect to scientific research in the economic zone and on the continental shelf, and general provisions regarding international cooperation in marine scientific research and transfer of marine technology;

(9) an international regime and machinery to deal with the exploration and exploitation of seabed resources beyond the limits of national jurisdiction (that is, beyond the economic zone or continental margin);

(10) a system for peaceful third-party settlement of disputes regarding the interpretation or application of the Convention which have not been resolved by negotiation or other agreed procedures.

A detailed examination of these two sets of issues is potentially helpful in understanding the stage reached in the negotiations and in charting future developments in the law of the sea with or without an early and comprehensive treaty. It can also be helpful in addressing a major dilemma that may face those concerned with the peaceful adaptation of international law to changed circumstances: Do the distortions that may result from numerical strength in multilateral fora outweigh the distortions that may result from the ability and willingness to apply strength in specific circumstances affecting the development of customary law? The costs of the former course are usually more obvious; are they now also greater in substance?

THE DEEP SEABEDS

It is customary to analyze the deep seabeds problem in terms of the contrasting interests of industrialized and developing countries. This is a tribute to the skill of those states that see their interests best served by defining international negotiations in these terms. In fact, a number of divergent interests are involved. A major difference between the negotiations on the economic zone and the negotiations on the deep seabeds is that, in the former instance, these divergent interests surfaced in the Conference as a whole, resulting in the formation of a variety of formal and informal interest groups cutting across regional and political lines. In the deep seabeds negotiation, every important article is becoming the subject of an official "Group of 77" position,¹⁰ despite the existence of substantial divergences of interest within that group.

The major direct economic interests regarding the deep seabeds can be classified in different ways. The following are some of them:

(1) *Consumption of metals produced from the deep seabeds.* If one disregards nationality, the overwhelming majority of all people in the world have at least indirect consumer interests in nickel, copper, manganese, and cobalt. Even on a state-by-state basis, the majority of states are net importers of these metals, directly or in finished products. Put simply, the consumer interest is in the avoidance of underproduction and in the minimization of prices. The consumer is concerned both with the efficiency of production and with the security of supply. The identity of the producer is in practice—if not necessarily in theory—relevant to both.

(2) *Internal national production of the metals produced from the deep seabeds.* Many people currently earn their livelihood, directly or indi-

¹⁰ The "Group of 77" now includes over 100 "developing countries" embracing wide variations in wealth, income, and agricultural industrial development. In his report, the Chairman of Committee I states:

I am convinced that we shall spend decades in fruitless dialogue if we continue to accept that the interests at this Conference may naively be classified into two: those of the developed versus those of the developing countries. Neither group is without a diversity of concrete interests, given the factor of uneven development within.

Supra note 5, at 10 (English text).

rectly, from the mining of nickel, copper, cobalt, and manganese. Exports of these minerals contribute to the foreign exchange earnings of some states, although the number of states is small, and the major exporters include some highly industrialized states. Put simply, producers would like to avoid overproduction (particularly by their competitors) and to maximize prices. While the term "land-based" producers is used for this category, and the manganese nodule deposits of great interest are generally far out to sea, it is possible that some states, particularly those bordering the Pacific, may see themselves as becoming internal producers of manganese nodules found within their economic zones (or continental shelves if a distance criterion is used as part of the definition).

(3) *Immediate deep seabed production.* A number of enterprises currently expect to be deep seabed producers within the next decade or so. They are concentrated in a few industrialized states. However, the investments involved are large, on the order of \$500 million per mine site. Opportunity for investment and growth, stability of expectations, a sufficient rate of return, and minimum outside interference are sought.

(4) *Potential deep seabed production.* The number of states that have reasonable expectations of being involved in at least some aspects of deep seabed mining (perhaps by the turn of the century) is by no means small, and by no means limited to currently highly industrialized states. The group clearly can include developing countries that are now rapidly industrializing, or that will have significant surplus capital at their disposal, or that enjoy good conditions for attracting processing plants from the point of view of mine site or market proximity, investment climate, and environmental restraints. While this group may share the interests of the immediate producers, it also wishes to ensure conditions favorable to future new entrants into the industry.

(5) *Public economic return.* It is customary in most societies to obtain some direct economic return for the extraction of public mineral reserves, such as a royalty or a share of profits. Most countries desire to impose and share in an economic return on deep seabed mineral extraction, despite the fact that it is not clear that global manganese nodule reserves will in fact be "depleted" in a strict sense. The debate over the ownership of the deep seabeds does not have an impact on this issue. The principle of generating revenues for the international community as a whole, primarily for the benefit of developing countries, is not disputed as an element of an ultimate treaty. However, the nature of the return, perhaps more so than the amount, is a major problem.

In and of themselves, there is nothing unique or insurmountable about these divergences of interest. Many nations must deal with them internally all the time. The problems inherent in arriving at a settlement on the economic zone were certainly more pressing, and arguably far more complex. It is the author's view that the reason that more progress has not been made is that sufficient immediate interests are not perceived by a sufficient number of states. This would be consistent with a number

of other explanations, such as ideology, dissatisfaction by some with the Committee II text, and lack of "political will."

In this situation, "broader" interests come to the fore in a highly conceptualized manner. The willingness to contest group ideology on the ground of achieving beneficial practical results is reduced. The urge to build a model relevant to unspecified present or future interests of little relevance to the deep seabeds becomes irresistible. Admittedly, uncertainty as to what lies below the surface of the deep seabeds adds to this, but it might be noted that this uncertainty did not preclude the emergence of a consensus that the resource jurisdiction of coastal states could go as far as, but not farther than, a 200-mile limit or, under the RSNT, the edge of the continental margin.

Thus, for many countries the Committee I negotiations are not about the deep seabeds or the minerals involved. They are about the future structure of the United Nations, totally unrelated commodities, and the role of multinational corporations in the development of national land and off-shore resources. This perception leads some to argue that a deep seabeds regime cannot be achieved until there is a broader North-South settlement. But if one believes that "settlement" is a dynamic process of many components rather than an event, then this is no answer.

The idea of the "Enterprise" deserves consideration in this regard. The Enterprise is proposed as the organ of the Seabed Authority that actually engages in mining operations by itself or, if it wishes, through contractors. The early arguments of industrial states against the Enterprise, and the current arguments of its proponents for special favorable treatment as against both state and private mining operations, reveal a curious consensus: the Enterprise is not expected to be as efficient as other operators. Who benefits from the inevitable reduction in public economic return and higher costs? While the Enterprise is frequently seen as a "concession" from rich to poor, it is in fact a "concession" whereby, in place of the revenues developing countries would otherwise receive directly, a collective decision has been taken to go into the mining business with those revenues.

The stated objective is "control." This emphasis on abstraction hides three underlying objectives of far broader scope: first, greater "control" of international organizations by developing countries; second, greater "control" of raw material markets by producers; and third, greater "control" of national resource development projects by the state. The deep seabeds negotiation is seen as a "precedent." This is not to suggest that the majority of developing countries insist on these three points as a *sine qua non* for a treaty, but rather that they do not resist the few who wish to use the negotiation as a test skirmish on the issues or to demonstrate their leadership potential. The basic interests in the deep seabeds still can be accommodated if the negotiations are brought back to those interests from their current level of abstraction.

The idea behind the system in the RSNT is a relatively simple one, variously referred to as the "parallel system" or the "banking system." The

parallel system of exploitation is one under which both the Enterprise and state or private companies exploit the deep seabeds.¹¹ Under the "banking system" approach to a parallel system, every applicant for a mine site (a "contract") would have to satisfy certain basic conditions.¹² One of these would be the simultaneous submission of two sites of equivalent value, one of which would be reserved for development by the Enterprise or a qualified developing country.¹³ Various rules regarding mining would be specified in the treaty,¹⁴ while others would be elaborated by the Council of the Seabed Authority on the basis of treaty criteria, subject to veto by one-fourth of the Contracting Parties.¹⁵ Disputes would be submitted to a special tribunal of the Seabed Authority.¹⁶ The system includes a twenty year overall limit on production based on a cumulative six percent growth segment of the nickel market which may be extended for five years. Among other things, this reassures developing country producers of metals found in manganese nodules; provides for implementing applicable commodity arrangements with respect to deep seabed mining; and contains provision for adjustment assistance to developing country producers which are adversely affected.¹⁷

Secretary of State Kissinger indicated at the spring session of the Conference that as part of a parallel system that includes assured access for states and their nationals, the United States would be willing to help the Enterprise get into business simultaneously or virtually simultaneously with other miners and would support a review of the system of exploitation after about twenty-five years.¹⁸ The United States also circulated an informal text on composition and voting of the Council which would give special protection to a variety of interests, particularly consumers and land-based producers.¹⁹

¹¹ RSNT, Part I, Art. 22.

¹² *Id.* Annex I. See especially paras. 4-12.

¹³ *Id.* Annex I, para. 8(d).

¹⁴ Generally *id.* Annex I, other than paras. 7 & 12.

¹⁵ Generally *id.*; Arts. 12, 13, 16, 22, 28(2)(xii); Annex I, paras. 7 & 12; Special Appendix.

¹⁶ *Id.* Arts. 33-40; Annex III.

¹⁷ *Id.* Art. 9; Annex I; paras. 8(a)(iv), 21.

¹⁸ See 74 DEPT. STATE BULL. 539 (1976). See also report of the Chairman of Committee I, *supra* note 5, at 8, 9 (English text).

¹⁹ Text of the U.S. informal text of Sept. 7, 1976:

Article 27

THE COUNCIL

Composition

1. The Council shall consist of 36 members of the Authority elected by the Assembly, the election to take place in the following order:

(a) The six industrialized States which have made the greatest contributions to the understanding of, the exploration for and the exploitation of, the resources of the Area as demonstrated by substantial investments or advanced technology in relation to the resources of the Area, including at least one Eastern European State;

(b) Six States from among the developing countries, including at least two from among the least developed countries;

(c) The six States which are the largest producers of the categories of minerals to be derived from the Area;

Thoughtful questions have been raised regarding the degree of detail in Part I of the RSNT. Much of it is of course analogous to the detail in national mining laws and regulations. But a more basic consideration is in-

(d) The six States which are the largest consumers of the categories of minerals to be derived from the Area;

(e) Twelve States elected according to the principle of equitable geographic distribution, to include at least two from each of the following regions: Africa, Asia, Latin America, Eastern Europe, and Western Europe & Others.

2. At least one-fourth of the members of the Council shall be landlocked and geographically disadvantaged States.

3. In electing the Council, the Assembly shall ensure that the members of the Council, taken as a whole, account for one-half of the value of the production and of the consumption of the categories of minerals to be derived from the Area accounted for by the members of the Authority.

4. A State Party which is qualified for election to more than one of the categories specified in paragraph 1 above shall select the category to which it chooses to be elected and, in the event it is not elected to this category, may select to be a candidate for another category for which it is qualified.

5. Members shall be eligible for reelection.

6. Elections shall take place at regular sessions of the Assembly, and each member of the Council shall be elected for a term of four years.

7. The Council shall function at the seat of the Authority and shall meet in continuous session, unless it decides otherwise.

Voting

8. Each member of the Council shall have one vote.

9. Decisions on questions of procedure shall be made by a simple majority of the members present and voting.

10. Except as provided in paragraph 11 of this Article, all decisions on questions of substance shall be made by a three-fourths majority of the members of the Council, provided that such majority represents more than one-half of the total value of the production, as well as more than one-half of the total value of the consumption, of the categories of minerals to be derived from the Area accounted for by the members of the Authority. If any member of the Council objects to a ruling by the President on whether a question is one of substance or not, that question shall be treated as a question of substance unless the Council by the majority specified in this paragraph decides otherwise.

11. All decisions related to the exercise of the Council's powers and functions concerning the adoption of necessary and appropriate measures in accordance with paragraph 4 of Article 9; the budget of the Authority and the assessment of contributions of States Parties and matters under Articles — shall be made by a three-fourths majority of the members of the Council, provided that such majority represents at least three-fourths of the total value of the production, as well as three-fourths of the total value of the consumption, of the categories of minerals to be derived from the Area accounted for by the members of the Authority. If any member of the Council objects to a ruling by the President on whether a question falls under this paragraph or not, that question shall be treated as falling under this paragraph unless the Council by the majority specified in this paragraph decides otherwise.

12. Before any matter of substance is put to a vote, a determination that efforts have been made to reach general agreement shall be made by the majority specified in paragraph 10.

Participation by All Members of the Authority

13. In order to ensure the widest possible participation by all members of the Authority in the decisions of the Council, each State Party shall have the right to assign the value of the production and of the consumption of the categories of minerals to be derived from the Area for which it accounts to another State Party for the purpose of composing the Council or to a member of the Council for the purpose of voting.

14. The Council shall establish a procedure whereby a member of the Authority not represented on the Council may send a representative to attend a meeting of the Council when a request is made by such member, provided that a matter particularly affecting it is under consideration. Such a representative shall be entitled to participate in the deliberations but not to vote.

volved. If one assumes that a certain condition on mining is or may be necessary, there are three basic choices for establishing the condition that involve striking a balance between predictability and flexibility—(i) to specify the condition objectively in the treaty; (ii) to defer to the Authority and to give specific guidance on what type of condition the Authority might impose under what circumstances; or (iii) to leave broad discretion to achieve a general objective. All three are in fact used in the RSNT. The problem is that if the matter itself is contentious, deferral of the issue vastly increases the uncertainty, places even greater burdens on the already difficult problem of decisionmaking procedures, and in essence asks a state in advance to accept the possibility of a result contrary to its interests.

The debate surrounding such phrases as “guaranteed access” or “controlled access” in fact involves this balance of predictability and flexibility. But perhaps equally importantly, it involves a question of procedural fairness and nondiscrimination. Policy decisions should be equally applicable to all prospective miners and should be taken in sufficient time to allow adequate planning by all concerned. Such decisions should be made in the treaty, the annexes, and in the Authority’s rules and regulations adopted thereunder, not in the context of a particular application to mine. The proponents of guaranteed access are not arguing for uncontrolled access; they are arguing that applications that comply with existing objective requirements, including the production limitations, should be granted. A political decision is not involved in the granting or denial of a contract. While some questions of interpretation may inevitably arise, that act is essentially ministerial. The political decisions are to be incorporated in the treaty, the annexes, and the rules and regulations adopted thereunder that govern the question of the requirements with which the application must comply.

By contrast, a system of “negotiated access,” such as some states employ on land, necessarily implies discretion as to the issues being negotiated on the part of the Authority’s “negotiator,” and in all probability, differences in treatment of different applicants as well. To the extent that basic economic interests are at stake, such a system amounts to a decision to provide for wide discretion without even the procedural guarantee that such discretion will be exercised in a generally applicable and nondiscriminatory way.

One of the interesting aspects of this part of the RSNT is its approach to the question of the exclusive right to use an area. First, as with the economic zone, the right to use is exclusive only for certain purposes—in this case resource purposes.²⁰ Second, in sharp contrast to the continental shelf concept or claims by states to land areas, the exclusive right to use is temporary and does not include a right not to use. Following the pattern in national mining laws, a mining contract would have a specified term and would be subject to stated performance requirements.²¹ The main

²⁰ RSNT, Part I, Art. 1(ii); Annex I, paras. 6(c), 11.

²¹ *Id.* Annex I, para. 12(b)(2), (3), (7).

purpose of course is to prevent speculative claims. Even the *Enterprise* must decide whether it wishes to use a reserved mine site.²² The key factor here is that rights are not ascribed to states (or their nationals) on the basis of effective occupation, as on land, or ipso facto, as on the continental shelf and, presumably, the economic zone.²³ The very size of the area granted is tied to production.²⁴ Locke might well have been comfortable with this system of "property."²⁵ Faced with the problem of seabed mining, Grotius might have been as well.

In terms of the development of customary law, the heart of this novel and perplexing problem is precisely the question of linking rights and use. Even the RSNT does not specify the size, duration, and performance requirements per se, but merely the criteria to be applied. Yet, if any one of these three limitations were to be omitted in form or effect from a law which still permits exclusive rights, a permanent (or renewable) property interest could potentially derive from a claim alone.

In this connection, it is interesting to note that the RSNT places no such limitations on prospecting, as prospecting "may be carried out by prospectors in the same area simultaneously," and confers no "preferential, proprietary, or exclusive rights on the prospector with respect to the resources or minerals."²⁶

The question of "access" to seabed mine sites has a negative as well as positive aspect. Without effective protection from preemptive claims by others, a positive right of access can quickly become a legal fiction. The contest can as easily take place in national courts as at sea.

Without some type of agreement, however limited in scope and participation, how does one establish that a period of *X* years is permissible for commencement of commercial production, that *Y* dollars is a permissible minimum level of investment, or that *Z* tons is a permissible minimum level of production? In whose opinion do *X* + 1, *Y* - 1, and *Z* - 1 all violate "customary international law"? What is the practical situation of a company that believes, with its government, in the *X*, *Y*, and *Z* figures if it "poaches" on a "preemptive" claim recognized by a foreign state when the company has personnel or assets subject to the jurisdiction of that foreign state? What if there are "flag of convenience" enforcement prob-

²² *Id.* Annex I, para. 8(d)(ii).

²³ See *id.*, Part II, Arts. 44, 65; Convention on the Continental Shelf, Art. 2, 15 UST 471, TIAS No. 5578, 499 UNTS 311, 52 AJIL 585 (1958).

²⁴ RSNT, Part I, Annex I, para. 12(b)(1).

²⁵ An analogy can be made between the deep seabeds requirements and the duty of full utilization with respect to fisheries in the economic zone (RSNT, Part II, Art. 51), particularly since the concept of full utilization was for some delegations central to the acceptability of the economic zone concept as a whole. However, the duration of the coastal state economic zone rights is not temporary, and the size of the area granted is not tied to production. On the other hand, the duty of full utilization in effect qualifies the exclusive right to use all of the fisheries if there is a surplus. The coastal state may control and regulate foreign access to the surplus, but may not arbitrarily prohibit it.

²⁶ RSNT, Part I, Annex I, para. 3.

lems regarding foreign claims? Assuming cases could be brought before the International Court of Justice (which is questionable), will the Court (with little direct precedent) conclude that an exclusive property interest is permissible and that continuous use of an area of a specific size is a condition of the property interest? If so, will it not be forced in effect to impose its view of the correct figures?

There is a natural tendency to view the private and public aspects of this problem separately. In fact, both the consumer and a responsible miner can be prejudiced by preemptive claims stimulated by private speculators or stimulated by geopolitical interests of states. And if speculation is allowed any success, others will be impelled to join the process quickly. The weight to be accorded this consideration in shaping possible alternatives to a global treaty is related not only to the probability of its occurrence, but also to the magnitude of the effect if it does occur.

At the least, it should be recognized that the problem is substantive, not cosmetic. A right of one man corresponds to the duty of another. Property can be expressed either as a right of use *erga omnes* or as a duty of others to refrain from such use. Expressing it as a duty to have reasonable regard for the user changes nothing of substance if the object of that reasonable regard is not merely accommodation of physical operations—usually safety—but protection of a priority interest in future use of the area itself.

Since analogies may be made to safety zones around artificial installations, it is important to note that under the RSNT the safety zones are of very limited size, must be "designed to ensure that they are reasonably related to the nature and function of the . . . installations," and entail jurisdiction of the coastal state only to "take appropriate measures to ensure the safety both of navigation and of the . . . installation."²⁷ The underlying accommodation is one of physical operations.

The debate over seabed mining abounds in analogies, sometimes regarded as precedents. The problem is that analogies can be found to support virtually any desired result, and many can be distinguished just as easily. The debate also abounds in appeals for a standard of reasonableness, with the implication that an entire body of conduct can be derived from unilateral application of a rule of reason—applied by which philosopher-king? The author is unaware of any rule that "states may make reasonable use of the high seas." The high seas are open to all states. States may exercise the freedoms of the high seas, some express, some "recognized by the general principles of international law," anywhere on the high seas.²⁸ There is an independent duty to exercise high seas freedoms with reasonable regard for the exercise of the freedom of the high seas by other states.²⁹ To convert a duty of reasonable regard into a

²⁷ *Id.* Part II, Art. 48.

²⁸ Convention on the High Seas, Art. 2; 13 UST 2312, TIAS No. 5200, 450 UNTS 82, 22 AJIL 842 (1958); See RSNT, Part II, Art. 76.

²⁹ *Id.*

limiting as well as expansive concept of a right to do anything reasonable is to substitute subjective judgment for law.

The high seas tradition is that exclusion or control of the activities of others is prohibited unless specifically permitted. The latter principle is stated categorically in the High Seas Convention and the RSNT.³⁰ Starting with sailing ships and fishing, that tradition has welcomed countless new uses, including powered ships, submarines, aircraft, oceanographic ships, communications cables and pipelines, data collection devices, offshore ports, etc. It was considered inhospitable to offshore oil development, and accordingly a partition of continental shelf resources among coastal states ensued. It has recently come to be considered inhospitable to fishing and other interests of coastal states, resulting in a fishing or economic zone partition among coastal states.

The underlying question is whether the tradition is antagonistic to deep seabed mining, and if so, whether it is sufficiently antagonistic to necessitate some type of partition. The answer in the RSNT is affirmative, although in a very carefully limited way that is far more circumscribed in scope than the continental shelf partition and that in fact seeks to preserve the underlying concept of a universal right to use the area.³¹ Whether states should proceed with such a partition pending agreement on ground rules and limitations for partition is a basic policy question that faces them today.

THE ECONOMIC ZONE

The economic zone is a radical experiment in international law. It has precursors. In conceptual terms, it can be seen as an outgrowth of the contiguous zone and the continental shelf. But in practical terms, it is a wholly new approach to solving the classic dilemma of choosing between *mare clausum* and *mare liberum*.

The essence of the economic zone is functional precision. It is best described by its constituent elements. No single concept dictates the conclusions reached with respect to different types of uses. Indeed, it is noteworthy that the dispute over the legal status of the economic zone is only now reaching its greatest intensity in the negotiations, after widespread agreement on many of the zone's main constituent elements has emerged.

The "radical" aspect of the economic zone is the attempt to apply modified *mare clausum* and *mare liberum* solutions to different problems in the same area. Unlike the contiguous zone, the economic zone is not a "buffer" where jurisdiction is linked to a violation of law in the territory or in the territorial sea of the coastal state.³² Unlike the continental shelf doctrine, the economic zone concept applies in major ways

³⁰ Convention on the High Seas, *supra* note 28, Arts. 6 & 22; RSNT, Part II, Arts. 80, 98.

³¹ RSNT, Part I, Arts. 3, 4, 7, 8.

³² See *id.*, Part II, Art. 32; Convention on the Territorial Sea and the Contiguous Zone, Art. 24; 15 UST 1606, TIAS No. 5639, 516 UNTS 205, 52 AJIL 851 (1958).

to uses of the water column.³³ Nevertheless, in establishing coastal state jurisdiction over resources, but preserving, for example, the freedom to lay and maintain submarine cables and pipelines and providing for accommodation of other freedoms in the water column by prohibiting unjustifiable interference with those freedoms, the 1958 Conventions did presage the economic zone.³⁴

Under the RSNT, some activities can be conducted in the economic zone only with the consent of the coastal state.³⁵ With respect to some of these, coastal state discretion to deny consent and regulate the activity is circumscribed.³⁶ Other activities can be conducted in the economic zone without coastal state consent.³⁷ With respect to some of these, certain regulatory or enforcement powers are given the coastal state.³⁸ Thus, different states will have jurisdiction over different activities in the same area; not infrequently, there will be concurrent jurisdiction, usually for different purposes.

Is such a complex arrangement stable? There is no way to tell now. Some proponents and some opponents of the economic zone concept originally saw in it the seeds of a transition to a territorial sea or its equivalent, although the majority of proponents and opponents seem to expect it to be a permanent arrangement. While one may quarrel with the results, certainly no more universal, and probably no more painstaking, review of relevant coastal and international interests with respect to each ocean use has ever been undertaken.

The totality of the economic zone regime is spread through Parts II, III, and IV of the RSNT. The main body, found in Part II, was not significantly changed from the original SNT; thus the comments made by the author in this respect in the earlier article³⁹ need not be repeated here. More attention will be devoted to an analysis of the zone set forth in the RSNT as a juridical concept and model.

One basic characteristic of the economic zone is that it does not entail an unfettered discretion for any state. Two central duties qualify the rights and obligations of both coastal and flag states.

First, in exercising its rights and performing its duties in the zone, the coastal state must have due regard to the rights and duties of other states;⁴⁰ in exercising their rights and performing their duties in the zone, other states must have due regard to the rights and duties of the coastal state.⁴¹ It can be anticipated that these balanced duties will provide the juridical

³³ See Convention on the Continental Shelf, *supra* note 23, Arts. 1, 3; RSNT, Part II, Arts. 44, 64, 66.

³⁴ See Convention on the Continental Shelf, *supra* note 23, Arts. 2, 4, 5; Convention on the High Seas, *supra* note 28, Art. 2.

³⁵ See, e.g., RSNT, Part II, Arts. 44, 48, 50, 51, 69; Part III, Art. 60.

³⁶ See, e.g., *id.* Part II, Arts. 51, 53, 58, 59; Part III, Art. 60.

³⁷ See, e.g., *id.* Part II, Arts. 46, 47, 77-103.

³⁸ See, e.g., *id.* Part III, Arts. 20, 21, 26, 28, 30, 43.

³⁹ Stevenson & Oxman, *supra* note 2, at 774-81.

⁴⁰ RSNT, Part II, Art. 44(2).

⁴¹ *Id.* Part III, Art. 46(3).

basis for resolving many practical problems of competing uses. The analogous high seas duty of a state exercising high seas freedoms to have reasonable regard for others exercising those freedoms is the antecedent of these rules,⁴² but curiously was not itself incorporated by reference into the economic zone. This was presumably an oversight, as the duty would apply, for example, as between two states exercising freedom of navigation in the zone.

Second, both coastal and flag states are subject to general environmental duties, as well as specific environmental duties with respect to specific uses.⁴³ In general, the environmental rights and duties rest with the state exercising jurisdiction over the source or potential source of pollution.⁴⁴ In the case of ships, there are additional environmental rights and duties for port states and coastal states.⁴⁵

While it can be argued that duties of this character also exist in general international law applicable to all activities of states, the RSNT represents a very significant advance in its attempt to enunciate these duties as positive law. To the extent that they are subject to third-party dispute settlement procedures, the potential for meaningful application of these duties, in a manner that takes into account differing circumstances, is greatly expanded.

It is customary, when discussing the economic zone, to list the relevant rights. Since these are inaccurately and somewhat incompletely summarized in the text itself, a new summary might be of some use. In brief, under the RSNT, the coastal state enjoys:

- sovereign rights for the purpose of exploring and exploiting, conserving, and managing the natural resources of the zone;⁴⁶
- exclusive jurisdiction (including the exclusive right to construct and authorize and regulate the construction, operation, and use) with respect to (i) artificial islands, (ii) installations and structures for purposes otherwise subject to its jurisdiction (*e.g.*, resources) and for other economic purposes, and (iii) installations and structures which may interfere with the exercise of the rights of the coastal state in the zone; and in addition the right to establish necessary safety zones of specified breadth around such artificial islands, installations, and structures;⁴⁷
- exclusive jurisdiction with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds;⁴⁸
- the exclusive right to authorize and regulate seabed drilling for all purposes;⁴⁹

⁴² Note 28, *supra*.

⁴³ RSNT, Part III, Chapter I.

⁴⁴ *Id.*

⁴⁵ *Id.* Arts. 20, 21, 26, 28, 29, 30, 31.

⁴⁶ *Id.* Part II, Art. 44; *see also* Arts. 50–57, 64–65.

⁴⁷ *Id.* Part II, Art. 48; *see also* Art. 68.

⁴⁸ *Id.* Part II, Art. 44. The words “exploitation and exploration of the zone” and “production” are of course designed to ensure that navigation is not covered by this rubric.

⁴⁹ *Id.* Part II, Arts. 64, 69.

- the right to be notified of, and to participate in, scientific research in the economic zone, including access to and assistance in interpreting all data and samples, and the right to consent to scientific research in the zone, provided that the coastal state “shall not withhold consent” unless the project bears substantially upon the exploration and exploitation of resources or meets other specified criteria;⁵⁰
- the right to consent to the delineation of the course for laying third-state pipelines;⁵¹
- the right of hot pursuit in respect to its competence in the zone;⁵²
- the right to establish and enforce antipollution regulations (no less effective than international rules and standards) with respect to seabed activities, artificial islands, installations, and structures under its jurisdiction,⁵³ third-state pipelines on the seabed,⁵⁴ and dumping of wastes and other matter in the zone;⁵⁵
- the right to designate special areas meeting certain criteria in which it may implement, in the absence of disapproval by the competent international organization, such antipollution rules and standards for foreign vessels as have been made applicable for special areas by the competent international organization (at present special discharge regulations);⁵⁶
- the right to establish and enforce antipollution regulations for vessels in ice-covered areas meeting certain criteria;⁵⁷
- the right to undertake physical inspection in case of vessel discharges in violation of international standards and, in more extreme cases, to bring proceedings against the vessels, subject to considerable safeguards, such as prompt release on payment of bond, and “flag state preemption” of coastal state proceedings if flag states are effectively enforcing environmental regulations against their vessels, except where there is major damage to the coastal state;⁵⁸
- the already established right of intervention, *i.e.*, the right to take preventive measures in the event of grave and imminent danger from pollution or threat of pollution following upon a maritime casualty.⁵⁹

(As might be expected, none of the pollution provisions apply for practical reasons to warships and other government noncommercial vessels and state aircraft.)⁶⁰

At the same time, in the economic zone, under the RSNT all states enjoy “the freedoms of navigation and overflight and of the laying of sub-

⁵⁰ *Id.* Part III, Arts. 58–60.

⁵¹ *Id.* Part II, Art. 64, 67(3).

⁵² *Id.* Part II, Art. 99(2).

⁵³ *Id.* Part III, Arts. 18, 24.

⁵⁴ *Id.* Part II, Art. 67(2).

⁵⁵ *Id.* Part III, Arts. 20, 26.

⁵⁶ *Id.* Part III, Arts. 21(5), 30(3–6, 8).

⁵⁷ *Id.* Part III, Art. 43.

⁵⁸ *Id.* Part III, Arts. 4(4), 5, 21(4), 30(3–7), 33–41.

⁵⁹ *Id.* Part III, Art. 31. See International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, TIAS No. 8068, 9 ILM 25 (1970); Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil, 1973, 13 ILM 605 (1974).

⁶⁰ RSNT, Part III, Art. 45.

marines cables and pipelines and other internationally lawful uses of the sea related to navigation and communication.”⁶¹ States also have the right to conduct marine scientific research, subject to the rights and duties of the coastal state set forth in the Convention.⁶² In addition, Articles 77 to 103 “and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Chapter” (on the economic zone).⁶³ Articles 77 to 103 comprise all of the substantive nonfisheries provisions of the high seas chapter except for the definition of the high seas and the list of high seas freedoms; these provisions are substantially the same as those in the High Seas Convention.⁶⁴ However, the economic zone is excluded from the definition in Article 75 of the high seas.⁶⁵

The debate over the status of the economic zone, which necessarily involves these provisions, does not therefore relate in a strict legal sense to the preservation of navigational and other communications freedoms, or to the preservation of classic high seas law in the zone. The latter includes, for example, the nationality of ships, exclusive jurisdiction of the flag state over its ships except as otherwise specified (which would include classic high seas exceptions such as piracy, as well as new economic zone exceptions such as fisheries and pollution enforcement), immunity of warships and government noncommercial ships, the duty to render assistance, the suppression of piracy and slave trade, and hot pursuit.

In a strict juridical sense, the economic zone elaborated in the RSNT should be regarded as an overlay on the high seas. It generally eliminates freedom of fishing and to a certain degree some other freedoms (*e.g.*, with respect to some scientific research and installations) and establishes a measure of concurrent rights or jurisdiction with respect to others (*e.g.*, some scientific research and some vessel-source pollution), but it does not eliminate the traditional role of the flag state.

The clearest example of this is in the articles on vessel-source pollution. The rights of the coastal state do not displace the rights and duties of the flag state to control pollution from its vessels; but rather supplement them.⁶⁶ However, other examples are worth noting as well. The sovereign rights of the coastal state with respect to fishing do not deprive a fishing vessel of freedom of navigation; nor do they deprive the flag state of its jurisdiction over that vessel, for example in the event of a collision,⁶⁷ or even its right to punish the master and crew for violating coastal state fishing laws independent of any coastal state action. The existence of separate jurisdiction over the same vessel in the same area depending on its activities may require some nice accommodations in practice, depending on the facts.

⁶¹ *Id.* Part II, Art. 46(1).

⁶² *Id.* Part III, Art. 49.

⁶³ *Id.* Part II, Art. 46(2).

⁶⁴ Convention on the High Sea, note 28 *supra*.

⁶⁵ RSNT, Part II, Art. 75.

⁶⁶ *Id.* Part II, Arts. 79, 80, 82, 85; Part III, Arts. 4, 21(2), 26(1)(b), 27, 28(2,3), 30(4,7), 38, 40, 44, 45.

⁶⁷ *Id.* Part II, Art. 85.

Absent specific evidence, it would be manifestly unjustifiable to stop and board a freighter or oil tanker navigating through the zone to ensure that it is not fishing, but it would also be manifestly imprudent to expect the coastal state to refrain from inquiry regarding a large fishing fleet moving slowly with gear in readiness and with no apparent destination through a rich fishing ground far from any known navigation route.

The debate on the status of the economic zone has also raised questions of priorities. The text as it stands does not assign priorities of use as between the coastal state and others as such. Resolution of the issue depends on the use, not on the state with jurisdiction. It is obvious that an installation necessarily enjoys priority of use in the area it occupies. This is why installations and their safety zones may not be placed where interference may be caused to recognized sealanes essential to international navigation, and why coastal states are given control over installations that may interfere with the exercise of their rights in the zone.⁶⁸ The International Regulations for the Prevention of Collision at Sea (1960) in effect provide certain priorities for vessels engaged in fishing, and deal with other questions of "rules of the road."⁶⁹ Thus, it is the details of the Convention itself and classic high seas traditions and rules incorporated by reference, rather than the status of the zone, that govern the question.

A more interesting argument regarding the legal status of the economic zone relates to the question of "residual rights." The chairman of Committee II in his latest report specifically confirmed his view that "the matter should be addressed in terms of 'residual rights.'"⁷⁰ Article 47 of the Committee II text provides:

In cases where the present Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

What are these residual rights? Would the result be any different under Article 2 of the High Seas Convention, which refers to "others [freedoms] recognized by the general principles of international law," enumerating only four freedoms explicitly, three of which are expressly preserved in the economic zone,⁷¹ and one of which is expressly omitted and converted to a coastal state sovereign right?⁷² Since the Conference is deadlocked on the status issue, one must presume that weighty considerations are involved, and not merely frivolous if fascinating questions such as swimming from a pleasure boat.

⁶⁸ *Id.* Part II, Art. 48.

⁶⁹ 16 UST 794. TIAS No. 5813.

⁷⁰ Note 5 *supra*, L.17, para. 26; RSNT, Part II, Introductory Note, para. 18.

⁷¹ Navigation, overflight, submarine cables, and pipelines. RSNT, Part II. Art. 46.

⁷² Fishing. *Id.* Part II, Art. 44.

Let us review the catalog. All economic rights are expressly attributed in the text: there is no economic residuum. Rights regarding scientific research are expressly dealt with. All drilling into the seabed requires coastal state consent. While the absence of records is a decided handicap, it was well understood in the "Evensen Group" which originally drafted Article 46, paragraph 1, that freedom to enjoy "other internationally lawful uses of the sea related to navigation and communication" was in addition to full freedom of navigation and overflight, and the article is intentionally so drafted. It was also negotiated after completion of the relevant articles relating to economic rights of the coastal state, in conjunction with the article that gave the coastal state jurisdiction not only over economic installations, but other installations "which may interfere with the exercise" of coastal state rights in the zone; and in the face of proposals to include "all installations" within coastal state jurisdiction that were unequivocally rejected.

What then is left? When would a warship or military aircraft not be engaged in navigation, overflight, or activities related to navigation and overflight? Readiness to defend sealanes and communications, including public manifestations of such readiness, has been a classic mission of navies for millennia. A use or threat of force brings the matter within the ambit of the UN Charter. The lawfulness of any other activity in principle does not relieve the flag state of its duty to have due regard to the rights and duties of the coastal state, which presumably covers such hypothetical concerns as damage to resources. More to the point, the warship is under the exclusive jurisdiction of the flag state in any event. It is relatively easy for a flag state to argue that any likely activities are covered by Article 46. It is also relatively easy to make out a good case for the flag state under the "respective importance to the parties" rule in Article 47. What precisely is it that the coastal state could or would do if the zone is not high seas that it would otherwise be unwilling or unable to do? Particularly since the elaboration of coastal state economic rights in the zone has now survived careful review by the Conference, the elimination of the words "related to navigation and communication" from Article 46 would better reflect the actual result and reduce the possibilities for misunderstanding.

The author's opinion is that the main problem with the text lies in the subjective impression given by the combination of Articles 46, 47, and 75 together, in that Article 75 in particular seems to contradict the intricate legal system that comprises the economic zone. The implication that high seas freedoms and high seas law are not preserved in the economic zone is contradicted by a close reading of the text, and even more importantly, by the basic assumptions surrounding the negotiation of the economic zone. Yet that implication could prove to be a temptation for coastal states to seek to alter the balance of the economic zone. A 200-mile territorial sea claimant might conveniently refuse to ratify the new "contract," yet point to the "decision in principle" that the area within 200 miles of the coast is not high seas. If supple, it might concede freedom of naviga-

tion in principle but then impose restraints that would not be permissible were it a party to the "contract." The fact that current 200-mile territorial sea claimants are among the most vociferous opponents of high seas status for the economic zone cannot be overlooked.

Thus, the real issue is that posed at the outset of the discussion of the economic zone, namely "Is such a complex arrangement stable?" If it is not, why should maritime states make the concessions inherent in the RSNT? Why concede any jurisdiction regarding scientific research? Why make any concessions on high technology operations such as installations or production of energy from water, currents, and winds? Important coastal states can control them by regulating connections to their land territory without direct offshore jurisdiction. Why concede coastal state vessel-source pollution rights in the zone when the risks to navigation may outweigh any real environmental benefits? Why compromise at all on highly migratory species? The answer of course is that these issues would be contentious anyway, and that a stable settlement would be in the overall interests of all concerned. But that presumes a stable settlement, not a steppingstone to a territorial sea.

A balanced solution, one that will engender stability, would be to follow the approach of the 1958 Territorial Sea, Continental Shelf, and High Seas Conventions, which establish clear coastal state rights beyond the territorial sea while making it clear that areas beyond the territorial sea retain their status as high seas.

Given this uncertainty, it seems possible that only a fishing zone—rather than an economic zone as described in the RSNT—will be absorbed into generally recognized customary law in the near term, although some states will certainly claim a full economic zone. The content of the fishing zone is likely to resemble that described in the RSNT. It is possible that the RSNT definition of the continental shelf as embracing the deep seabed as well as continental margin areas within 200 miles will also be absorbed quickly,⁷³ although the implications of extension of the continental shelf concept to the deep seabeds in principle and without precise agreement on limits bear some careful thought.

On the other hand, if the four main outstanding issues regarding the economic zone are resolved in the negotiations—the status of the zone, scientific research, access of landlocked and geographically disadvantaged states to fisheries, and dispute settlement—then the probability of a widely acceptable treaty dramatically increases (assuming a way around the Committee I problem). Whether the probability of a customary law economic zone along the lines of the RSNT also increases is unclear, since such a development would not be accompanied by the protection of dispute settlement. This is a particularly weighty consideration with respect to coastal state rights regarding vessel-source pollution. It is entirely possible that, at least in this regard, some states will view the existence of compulsory third-party settlement procedures as an essential substantive ele-

⁷³ *Id.* Part II, Art. 64.

ment of any concession of coastal state rights and may be reinforced in their disquietude by claims that assert comprehensive pollution control jurisdiction, rather than the refined rights in Part III of the RSNT, because of the imprecise drafting of Article 44 of Part II. In this case, it of course still remains open to amend a treaty like the 1973 London Convention⁷⁴ to incorporate the substantive and procedural provisions of the RSNT on pollution as a means of obtaining a complete package, but the question of incentives would remain.

Part IV of the new RSNT, on the settlement of disputes,⁷⁵ once again illustrates the central importance of the dispute settlement issue to the overall balance of the economic zone. Compulsory procedures apply to disputes "relating to the exercise by a coastal State of sovereign rights, exclusive rights or exclusive jurisdiction . . . only" in the cases specified in Article 17,⁷⁶ including violations regarding navigation and overflight, environmental and scientific research questions, and an interesting provision on living resources.

As in the earlier texts, a state still may declare the forum in which it is subject to suit and may choose one or more of the following: a new Law of the Sea Tribunal, the International Court of Justice, arbitration, or special arbitration procedures utilizing experts for fisheries, pollution, scientific research, or navigation disputes.⁷⁷ However, the plaintiff may now not only initiate proceedings in the forum chosen by the defendant but also choose arbitration.⁷⁸

Of the relatively few changes made in Part II of the RSNT, one is of particular interest to states that are proceeding to establish 200-mile zones at present. Articles 61 and 70 of the SNT had provided that the median or equidistant line should be provisionally applied between opposite or adjacent states pending settlement between them on delimitation of the economic zone and continental shelf. This rule has now been eliminated. A clause has been substituted to the effect that the states concerned should make provisional arrangements, "taking into account the provisions of paragraph 1,"⁷⁹ namely the general principles regarding delimitation. In his introductory note, the Chairman of Committee II explained: "Since the Conference may not adopt a compulsory jurisdictional procedure for the settlement of delimitation disputes, I felt that the reference to the median or equidistant line as an interim solution might not have the intended effect of encouraging agreements."⁸⁰ Part IV of the RSNT permits a state to

⁷⁴ International Convention for the Prevention of Pollution from Ships, 1973, IMCO Doc. MP/CONF./WP.35, Nov. 2, 1973 (not yet in force), 12 ILM 1219 (1973).

⁷⁵ Note 6, *supra*. The provisions in the RSNT on dispute settlement are not discussed in detail here, since they are the subject of a note appearing elsewhere in this issue of the *Journal*. See Adede, *Law of the Sea: The Scope of the Third-Party, Compulsory Procedures for Settlement of Disputes*, *infra*, p. 305.

⁷⁶ For text of Article 17, see *infra* p. 305.

⁷⁷ RSNT, Part IV, note 6, *supra*, Art. 9(1).

⁷⁸ *Id.* Part IV, Art. 9(5).

⁷⁹ *Id.* Part II, Arts. 62(3), 71(3).

⁸⁰ *Id.* Part II, Introductory Note, para. 12.

make a declaration excluding "disputes concerning sea boundary delimitations between adjacent or opposite States" from compulsory procedures under the Convention, "provided that the State making such a declaration shall indicate therein a regional or other third party procedure, entailing a binding decision, which it accepts for the settlement of such disputes."⁸¹

While delimitation problems are not new, the urgency of the problem in connection with extensions of fisheries jurisdiction is of some importance. Unlike oil development, fishing has been conducted for centuries in many border areas under high seas principles. The number of people involved can be large; the basic investment has already been made; fishermen tend to be highly individualistic. Moreover, delimitation problems can accentuate disputes over islands and land boundaries. Even where the two coastal states can temporarily tolerate a status quo arrangement regarding their respective fishermen, the question of who deals with third states remains. What precisely will occur in areas where the coastal state governments in question are at best not on speaking terms? While a new source of friction is hardly welcome, in some cases the practical need for some arrangement may present an opportunity for dialogue.

CONCLUSION

The Law of the Sea Conference has reached the stage where governments must weigh the benefits and losses of a treaty against no treaty. For most, positive as well as negative factors are involved. More importantly, the closer the treaty comes to reflecting a "realistic" balance of interests, the more it seems to approximate likely developments in the absence of a treaty, positive or negative. Rather than overtly accept the unpleasant aspects of those realities, some may prefer to let events develop, and possibly avoid or leave to others the responsibility for facing up to those realities.

The underlying perceptions of future reality without a treaty are probably all wrong in some respects; many may be gravely wrong in major respects. Many governments are seeing the issue through the eyes of those who have participated in or have been horrified by the Law of the Sea Conference, or both, and who are not responsible for actual operational problems. They tend to base their projections on statements, threats, and negotiating assumptions, not on projections of the actual stuff of customary law, namely the behavior of states (not merely their words) in difficult situations where competing interests are at stake. The author's view is that one result of no treaty may be a struggle over navigation and possibly some resources that will gradually become considerably more costly and unpleasant for many. But again, the cost is a future one, not a present one as with treaty "concessions."

Since the inception of the negotiations, three basic motive forces for a treaty have been: first, to protect navigation and overflight from coastal

⁸¹ *Id.* Part IV, Art. 18(1)(a).

state incursions; second, to achieve broad coastal state control of living and nonliving resources and ancillary matters; and third, to establish an international regime for the seabeds beyond coastal state jurisdiction under an entirely new concept of the common heritage of mankind.

For the most part, as regards fisheries, the second motive force has been reduced by developments outside the Conference, ironically based upon its very success. The United States,⁸² the European Communities,⁸³ and the Soviet Union⁸⁴ have joined other coastal states⁸⁵ in declaring a 200-mile fisheries zone. Despite years of work on the issue, there is still doubt as to the extent to which the majority of states perceive the magnitude of their interests in navigation and overflight, or the danger that the generally satisfactory (and in some cases markedly improved) navigational regimes in the RSNT may be lost without a treaty. As to the third motive force, the realization that concepts of the common heritage must come to grips with real interests has had a deflating effect.

Thus, the basic purpose of this treaty—like any other institutional treaty designed to govern long-term relationships—is only now becoming apparent in more than a rhetorical sense. The ultimate value of the treaty lies not in any extraordinary substantive windfalls, but as with most treaties—indeed as with most law—in the relative increase in stability, certainty, predictability, and common principles and procedures for narrowing and resolving differences. The “political decisions” states must now make turn on the relative weight they collectively attach to these achievements. It is not so much the sea as it is international law and the development of cooperative international institutions that hang in the balance.

⁸² Fisheries Conservation and Management Act, 90 Stat. 331, PL 94-265, 16 USC 1801, 70 AJIL 624 (1976), 15 ILM 634 (1976).

⁸³ Resolution of the Council of the European Communities on External Aspects of the Creation of a 200-mile Fishery Zone, 15 ILM 1425 (1976).

⁸⁴ Decree of the Presidium of the Supreme Soviet of the U.S.S.R. Dec. 10, 1976, UN Doc. A/CONF. 62/53 (1977), 15 ILM 1381 (1976).

⁸⁵ *E.g.*, Canada, Order-in-Council, 110 Can. Gaz. Part I, Extra No. 101, Nov. 1, 1976, 15 ILM 1372 (1976). Mexico, Decree Adding to Article 27 of the Political Constitution, Diario Oficial, Feb. 6, 1976, 15 ILM 380 (1976).

INCORPORATION OF THE LAW OF NATIONS DURING THE AMERICAN REVOLUTION—THE CASE OF THE SAN ANTONIO

By Henry J. Bourguignon *

In an article published in this *Journal* in 1932, Professor Edwin Dickinson pointed out that the Supreme Court, in the first thirty years of its existence, dealt with 82 cases which raised questions of international law. The Court and counsel before it repeatedly cited the familiar writers on the law of nations: Grotius, Pufendorf, Bynkershoek, Burlamaqui, Rutherford, and Vattel. As Dickinson pointed out, "It is an ancient doctrine of the Anglo-American common law that the law of nations is incorporated in and in some sense forms part of the national law."¹ Largely through decisions based on the principles expressed by the classical writers, the law of nations was early incorporated as part of the law of the United States.

The purpose of this study is to show that American lawyers and judges, in the decade before the Constitution was written, turned to basically these same classical theorists on the law of nations when arguing or determining questions of international law. Many of these arose in prize cases which resulted from privateering during the American Revolution. More significantly this article will provide a concrete example to show how these authorities on the law of nations were employed in the legal arguments of one prize appeal which had potentially serious international ramifications. The lawyers and judges instinctively turned to the treatises on the law of nations as one source of legal principles for arguing or deciding the various issues which arose in this and other prize appeals. Before looking at the particular prize appeal on which this study will focus, we should have some idea of the origins, development, and practice of the appellate prize court created by the Continental Congress.

After the armed skirmishes of Lexington and Concord and the British armed response, the Second Continental Congress saw clearly that military preparedness must accompany its continued efforts at a peaceful settlement. In July 1775 it resolved that the colonies should put their militias into a

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¹ Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AJIL 239, 259 (1932). More recently Judge Edward Dumbauld has discussed the reliance on these same law-of-nations authorities by various American leaders during the Revolutionary War and during the first Washington administration. Dumbauld, *Independence under International Law*, 70 *id.* 425 (1976). Even earlier use of some of these same writers has been noted by Julius Goebel, Jr., in *The Courts and the Law in Colonial New York*, reprinted in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 275 (D. H. Flaherty ed. 1969).

state of readiness and arm vessels for the protection of their harbors and navigation.²

Responding both to this congressional recommendation and to their own sense of need, Massachusetts, Rhode Island, Connecticut, Pennsylvania, and South Carolina in September and October started arming vessels.³ By September, George Washington, who had been named Commander-in-Chief by the Congress, also sent some armed vessels to sea to capture British ships and their much needed military cargoes.⁴ Congress early in October informed Washington that two British vessels loaded with military supplies were sailing for Quebec without convoy. It urged him to arm vessels to intercept this shipment and authorized him to instruct other crews to capture British transports with military cargoes.⁵

Washington soon appreciated the necessity of having a proper procedure for adjudicating the legality of the captures being made. Early in November he urgently asked Congress to establish courts to determine, by summary proceedings, the legality of captures by the vessels fitted out at the expense of Congress.⁶

Congress responded with its resolves of November 25, 1775. A committee, dominated by lawyers, reported to Congress that British ships had rifled properly cleared American vessels and that the British Navy had orders to attack and destroy seaport towns and disable armed American vessels. Thinking of the ancient maritime right of reprisal, Congress authorized the capture of British vessels warring on the colonies and their military cargoes. It forbade privateering without commissions from Congress. It recommended that the colonial assemblies establish prize courts with trial by jury. (Jury trials were an innovation in admiralty practice, obviously inspired by the American complaints against the lack of jury trial in the expanded jurisdiction of vice-admiralty courts under the Sugar and Stamp Acts and the Townshend Acts.) In all cases of capture Congress authorized appeals to such persons as Congress would appoint. The congressional resolves also determined the shares of prizes to be awarded to various parties concerned in the capture. Finally Congress gave retroactive authorization to the captures made by Washington's tiny navy and confirmed his determination of the prize cases that he had heard.⁷

² 2 JOURNALS OF THE CONTINENTAL CONGRESS 189 (W. C. Ford ed., 34 vols., 1904-1937) (hereinafter cited as Ford, JCC).

³ 1 W. B. CLARK, NAVAL DOCUMENTS OF THE AMERICAN REVOLUTION 1255 (1964); 2 *id.* 26, 48, 97, 99, 117, 122, 126, 154, 180, 189, 203, 228, 236, 270, 285, 299, 330, 378, 382, 394, 425, 480-83, 529, 654, 662, 962.

⁴ W. B. CLARK, GEORGE WASHINGTON'S NAVY 3-64 (1960).

⁵ 3 Ford, JCC 277-78; John Hancock to Nicholas Cooke, Oct. 5, 1775, 2 CLARK, *supra* note 3, at 312.

⁶ Washington to the President of Congress, Nov. 8 and 11, 1775. 4 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 73, 81-82 (J. C. Fitzpatrick ed., 39 vols., 1931-1944). See also Washington to John Augustine Washington, Oct. 13, 1775, Washington to Richard Henry Lee, Nov. 8, 1775 and Washington to Joseph Reed, Nov. 20, 1775, *id.* 25-28, 75, 103-07.

⁷ 3 Ford, JCC 371-75. The committee consisted of: George Wythe, Edward Rutledge, John Adams, William Livingston, Benjamin Franklin, James Wilson, and Thomas

Congress thereafter from time to time defined the vessels and cargoes liable to seizure⁸ and prepared commissions and instructions for privateers, modeled closely on British commissions and instructions.⁹ It also established rules to control cases of joint capture and cases of recapture of American property.¹⁰

Most of the states acted upon the recommendation of Congress and established courts with jurisdiction over prize questions.¹¹ Some states also granted their courts broader jurisdiction to include civil maritime disputes.¹²

Ignoring the congressional resolution that "in all cases an appeal shall be allowed to Congress," most states imposed serious limitations on the right of prize appeals. Massachusetts and New Hampshire, during the early years of the war, allowed review of prize judgments by Congress only when the seizure had been made by a naval vessel fitted out at the expense of Congress.¹³ In 1779 both states, under pressure from Congress, allowed appeals to Congress in cases in which a subject of a friendly nation had filed a claim to the captured property.¹⁴ These two states, however, were still far from compliance with the congressional resolve which provided that all prize appeals could be taken to Congress.

Pennsylvania forbade appellate review of the factual determinations of its juries.¹⁵ As we shall see, this restriction, in the case of the sloop *Active*, led to a serious confrontation between the Continental Congress and the

Johnson. *Id.* 357-58. See also C. UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* *passim* (1960) and Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1769-1776*, 16 WILLIAM AND MARY Q. 40-82 (3d. ser. 1959).

⁸ 4 Ford, JCC 229-32, 257-59; 5 *id.* 605-06.

⁹ 4 *id.* 247-48, 251-54; 11 *id.* 486. Cf. British commission and instructions in W. BEAWES, *LEX MERCATORIA REDIVIVA OR THE MERCHANT'S DIRECTORY* 219-23 (1752).

¹⁰ 3 Ford, JCC 407; 19 *id.* 315; 21 *id.* 1156, 1172; 22 *id.* 10-11.

¹¹ For a full, detailed discussion of the statutory and constitutional provisions for prize courts by the various states, see H. J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775-1787* Ch. I, text accompanying notes 37-87 (to be published, 1977).

¹² 5 ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF MASSACHUSETTS Bay 806-08 (21 vols., 1869-1922); RHODE ISLAND SESSION LAWS, 2d. sess., July 1780, at 9-14 (18 vols., n.d.); 9 THE STATUTES AT LARGE OF PENNSYLVANIA 277-83 (J. T. Mitchell & H. Flanders eds., 18 vols., 1896-1915); NEW JERSEY SESSION LAWS, 3d sess., 1st sitting, 1778, at 18-24; 9 THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 102-05, 130-32, 202-06 (W. W. Hening ed., 13 vols., 1809-1823); 24 THE STATE RECORDS OF NORTH CAROLINA 119-23 (W. Clark ed., 26 vols., 1836-1914).

¹³ 5 ACTS AND RESOLVES OF MASSACHUSETTS, *supra* note 12, at 474-77; 4 LAWS OF NEW HAMPSHIRE INCLUDING PUBLIC AND PRIVATE ACTS AND RESOLVES 25-32 (A. S. Batchellor *et al.* eds., 10 vols., 1904-1922).

¹⁴ 5 ACTS AND RESOLVES OF MASSACHUSETTS, *supra* note 12, at 1077-78; 4 LAWS OF NEW HAMPSHIRE, *supra* note 13, at 238.

¹⁵ 9 STATUTES OF PENNSYLVANIA, *supra* note 12, at 277-83. The Pennsylvania statute provided that "the finding of the said jury shall establish the facts without re-examination or appeal."

State of Pennsylvania. In 1780, as a result of the dispute over the *Active* case, Pennsylvania eliminated jury trials in prize cases and thereafter granted appeals to Congress without any restrictions.¹⁶

Virginia allowed appeals to Congress except where both parties to the prize dispute were citizens of the state.¹⁷ The Maryland Constitution of 1776 explicitly provided that all appeals from the admiralty court lay to the state court of appeals, whose judgment would be final.¹⁸ North Carolina allowed appeals to Congress but made the appellant liable to pay triple costs if the decree of the state admiralty court should be affirmed.¹⁹ Late in the war, Rhode Island, trying to retaliate against the states which had imposed limitations on the right of appeal to Congress, enacted a reciprocity requirement: No appeal would be allowed to Congress in any case where the appellant was from a state which refused to allow appeals to Congress.²⁰

Only grudgingly, therefore, did most states allow review by the judicial body Congress created to hear all prize appeals. With such hesitancy and reluctance apparent in the states, it is surprising that the congressional appellate prize court ever functioned at all.

Congress did create a judicial body, however, which heard and determined a substantial number of appeals from the state prize courts. The first eight appeals filed with Congress were referred to ad hoc committees selected by Congress to hear and determine a particular appeal.²¹ At first these early committees acted like a legislative committee, which they were, submitting reports to Congress for final action.²² Almost at once, however, they assumed the style and procedure of a judicial body. They issued decrees affirming or reversing the trial court, rather than reports to Congress calling for further action.²³

¹⁶ 10 *id.* 97-106.

¹⁷ 10 STATUTES OF VIRGINIA, *supra* note 12, at 98-102.

¹⁸ 3 THE FEDERAL AND STATE CONSTITUTIONS 1700 (F. C. Thorpe ed., 7 vols., 1909). Four cases were appealed to Congress, apparently without any dispute as to this limitation in the state constitution.

¹⁹ 24 RECORDS OF NORTH CAROLINA, *supra* note 12, at 119-23.

²⁰ RHODE ISLAND SESSION LAWS, Nov. sess. 1780, *supra* note 12, at 18-19.

²¹ 5 Ford, JCC 631, 647, 702, 741, 835; 6 *id.* 884-85, 931-32, 964, 985-86; 7 *id.* 13, 30.

²² *Elizabeth* (Wentworth v. Hart), Oct. 14, 1776, #2 Records of the Court of Appeals in Cases of Capture (National Archives), (hereinafter cited as RCA). See also 5 Ford, JCC 835; 6 *id.* 870-73; and *Richmond* (Craig v. Folger), Jan. 17, 1777, RCA, #7. The citations to cases from the Records of the Court of Appeals in Cases of Capture do not follow the captions given in the National Archives list of cases which appears in the pamphlet accompanying Microcopy 162, since this list is not uniform nor accurate in the mode of citation. This pamphlet merely follows, with minor modifications, the list of cases compiled by J. C. Bancroft Davis as it appears in the appendix to 131 U.S. Reports. The citations here will include the following information, when available in the records: the name of the vessel; the names of the two parties first mentioned in the litigation, with the name of the appellant given first; the date of the final action on appeal; and the number of the file in the National Archives RCA collection.

²³ *Thistle* (Roberts v. McAroy) Sept. 19, 1776, RCA, #1; *Vulcan* (Ingram v. Joyne), Jan. 24, 1777, RCA, #5.

After this initial trial period Congress, on January 30, 1777, established a standing committee of five members to hear and determine prize appeals. Congress also authorized the Committee on Appeals to appoint a register and allowed determination of appeals by any three of the members of the Committee.²⁴

The Committee on Appeals continued to determine prize appeals until February 1780, when Congress created the Court of Appeals in Cases of Capture. The members of the Committee on Appeals, of course, were all members of Congress, whereas the judges sitting on the Court of Appeals could not be congressmen. The Committee suffered from the same problem of fluctuating membership that vexed Congress. In the three years that the Committee functioned, at least forty-two appeals were heard.²⁵ During this period thirty-seven members of Congress were appointed to sit on the Committee.²⁶ Congress showed an appreciation of the judicial character of the Committee; of the thirty-seven congressmen appointed, all but three had studied law and been admitted to the bar.²⁷

Congress was persuaded of the inadequacy of the Committee on Appeals largely because of its frustration over Pennsylvania's flat refusal to execute the decree of the Committee on Appeals reversing the Pennsylvania admiralty court in the case of the sloop *Active*.

Gideon Olmsted and three other American seamen from Connecticut had been captured at sea by the British, taken to Jamaica, and impressed to serve on board the sloop *Active* which was carrying supplies to the British in New York. About midnight of September 6, 1778, these four took control of the vessel, locked the British crew below deck, and sailed toward New Jersey. By mid-morning of September 8, Egg Harbor, New Jersey was in sight. Two American privateers sailing out of Philadelphia appeared, hailed the *Active*, boarded it, and seized the vessel as prize. They took the *Active* into Philadelphia and libeled it as British property in the admiralty court. Olmsted and the three other Americans who had captured the *Active* filed a claim to the whole of the vessel and its cargo of rum and coffee. The two Philadelphia privateers alleged that the Olmsted group never had effective control of the *Active*. The Philadelphia jury, after hearing the evidence, condemned the *Active* and its cargo as lawful prize. It awarded one-fourth of the proceeds to the four Connecticut seamen and divided the remainder between the two Philadelphia privateers.²⁸ Olmsted and the three other impressed seamen, the first captors of the *Active*, appealed to Congress. The Committee on Appeals, consisting of Oliver Ellsworth, William Henry Drayton, John Henry, and William El-

²⁴ 7 Ford, JCC 75, 336-37, 348.

²⁵ RCA *passim*.

²⁶ 7 Ford, JCC 75, 172, 336-37; 9 *id.* 800, 936, 1015; 10 *id.* 177; 11 *id.* 724; 12 *id.* 347, 1064; 13 *id.* 297; 14 *id.* 896, 953, 1004; 15 *id.* 1171, 1360; 16 *id.* 17.

²⁷ BIOGRAPHICAL DICTIONARY OF THE AMERICAN CONGRESS, 1774-1961 *passim* (1961).

²⁸ *Active* (Olmsted v. Houston), Dec. 15, 1778, RCA, #39; THE CASE OF THE SLOOP ACTIVE (1779); THE WHOLE PROCEEDINGS IN THE CASE OF OLMSTED AND OTHERS VERSUS RITTENHOUSE'S EXECUTRICES (R. Peters ed. 1809); Journal of Gideon Olmsted, Frederick Law Olmsted Collection (Library of Congress, Manuscript Division).

lery, reversed the trial court. It awarded the entire proceeds to the Olmsted group and assessed costs against the Philadelphia privateers.²⁹

Judge Ross, the Pennsylvania admiralty judge, refused to execute this decree of the Committee of Appeals. He argued, and the state's executive council agreed, that by state law the facts established by a jury in a maritime suit could not be reexamined on appeal. The jury had determined the factual question whether Olmsted and his three companions had effective control of the *Active* when the Philadelphia privateers captured it. This factual question, the Pennsylvania officials insisted, could not be reexamined on appeal. Repeated efforts by Congress to persuade Pennsylvania officials to relent met only with failure.³⁰

Congress spent considerable time debating the report of a special committee created to confer with Pennsylvania. On March 6, 1779, Congress approved a strongly worded report reaffirming the authority of the Committee on Appeals in this case as well as in all others. Congress maintained that no fact finding by a jury could destroy the right of appeal. It alone was invested with the powers of war and peace, and, therefore, with the sole power of executing the law of nations, the rule of decisions in prize cases. Control of prize courts by final appeal to Congress was essential to assure a just and uniform application of the law of nations. Without this final appellate authority, Congress reasoned, juries could involve the United States in hostilities. Without appellate review, Congress would lose its power of satisfying foreign complaints that neutral rights or treaty obligations had been violated. The decree of the Committee on Appeals in the case of the sloop *Active*, Congress concluded, should be executed by the Pennsylvania admiralty court.³¹ We shall see, in the case of the *San Antonio*, that Congress had good reason to fear that juries could entangle the nation in international disputes.

Congress' brave words bore no fruit. But Gideon Olmsted, after the Constitution was ratified and the federal judiciary established, reasserted his claim. After thirty years of waiting, the Supreme Court finally upheld his claim based on the decree of the Committee on Appeals.³²

Meanwhile the Committee on Appeals had informed Congress that it would not hear any other appeals until its authority was settled and its decrees given full effect.³³ The special committee appointed by Congress to study the *Active* case in its initial report had noted, with some under-

²⁹ *Active*, RCA #39.

³⁰ 11 PENNSYLVANIA, COLONIAL RECORDS 657, 697 (S. Hazard ed., 16 vols., 1838-1853); 4 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 43, 45-46 (E. C. Burnett ed., 8 vols., 1921-1936); 7 PENNSYLVANIA ARCHIVES, 1st ser. 170, 172 (S. Hazard ed., 11 vols., 1852-1855); 13 Ford, JCC 86-92; Papers of the Continental Congress (National Archives) (hereinafter cited as PCC), Item 29, at 351, 355.

³¹ PCC, Item 29, at 357-59; 13 Ford, JCC 134-37, 183, 252-53, 270-71, 281-85.

³² Ross et al. Executors of Ross v. Rittenhouse, 2 Dallas 160 (1792); 1 Yeates 443 (1795 *sic*); Olmsted v. The Active, 18 Fed. Cases, #10,503a (1803); United States v. Peters, 5 Cranch 115 (1809); United States v. Bright, 24 Fed. Cases, #14,647 (1809).

³³ 13 Ford, JCC 86-92.

statement, that it had discovered some imperfections in the system of maritime courts.³⁴ A group of prominent Philadelphia merchants sent a memorial to Congress commenting on a few imperfections they had observed. They pointed to the constant fluctuation of membership, which caused delays and prevented the establishment of fixed legal principles. The merchants urged Congress to name judges who were not members of Congress and could devote more time to hearing cases.³⁵

Congress appointed a committee to plan a revised appellate system.³⁶ Reporting to Congress in October 1779, the committee proposed two appellate prize courts with jurisdiction over different parts of the country. The appellate courts would have marshals as well as registers and would have contempt power to fine and imprison even the trial court officials and judges who disobeyed their decrees or orders. The committee report would have required the state trial courts to drop jury trials in prize cases.³⁷

Congress, after repeated debate over the next two months, refused to approve such a strong appellate judiciary, and appointed a new committee to revise the previous committee's work. The compromise proposal from this new committee passed Congress. One "Court of Appeals in Cases of Capture" was created with three judges, not members of Congress, who were to be commissioned by Congress. Any two of them could conduct business. Instead of the marshal and the contempt power originally proposed, Congress meekly urged the states to pass laws directing admiralty courts to execute the decrees of the Court of Appeals.³⁸ Congress staffed the Court with the best lawyers it found available but tried to avoid overrepresentation on the Court from any section of the country.³⁹ The Court of Appeals determined more than sixty cases, including several rehearings, before its demise in 1787.

With this background, we can turn to the case of the *San Antonio*. This was one of the cases in which the congressional appellate prize court looked to the law of nations as a source of legal principles on which to base its decree.

The British in 1763 had through diplomacy expanded their American colonies by the acquisition of Florida, including the settlement at Pensacola, part of West Florida. During the American Revolution, after Spain de-

³⁴ *Id.* 137.

³⁵ May 22, 1779, PCC, Item 69, II at 65, 69; 14 Ford, JCC 626-27.

³⁶ 14 Ford, JCC 1002.

³⁷ 15 *id.* 1220-23, 1349-50, 1356, 1360; 16 *id.* 13-14.

³⁸ *Id.* 61-64.

³⁹ Congress first chose George Wythe of Virginia, William Paca of Maryland, and Titus Hosmer of Connecticut. 16 Ford, JCC 64, 79. When George Wythe declined the appointment, Congress elected Cyrus Griffin, also of Virginia. *Id.* 322, 397, 411. Hosmer accepted but probably never heard a case since he was sick when appointed and died the following summer. Hosmer to Samuel Huntington, April 12, 1780, PCC, Item 78, XII at 17; 17 Ford, JCC 779. The Court functioned for a year and a half with only two judges, Paca and Griffin, in commission. When Paca resigned in 1782, Congress elected George Read of Delaware and John Lowell of Massachusetts. 23 Ford, JCC 758, 765, 797, and 862.

clared war on England, the Spanish in Louisiana under the young Governor Bernardo De Gálvez conquered Pensacola and the other British outposts in West Florida. Pensacola fell to the Spanish in May 1781,⁴⁰ some five months before the surrender of Cornwallis at Yorktown. The surrender of Pensacola began the chain of events which led to the capture of the *San Antonio*.

Article fourteen of the capitulation of Pensacola provided that any inhabitants of the settlement who so desired could obtain a passport to leave the colony and return to Britain with their family and property.⁴¹ Edmund Rushwegg of Pensacola obtained permission to charter a vessel to transport himself, his family, and his belongings to London. He chartered the brigantine *San Antonio* of New Orleans from one Antonio Argote and received a passport from the Spanish authorities to assure safe conduct for the vessel on its voyage to London. The passport made no mention of the return voyage.⁴²

The *San Antonio* left New Orleans for London at the beginning of May 1782 and, after taking on cargo, the *San Antonio* sailed for London in September. It arrived at the mouth of the Mississippi in November and was captured on November 25 by an American privateer from Massachusetts, the brigantine *Patty*, William Hayden, captain. The *San Antonio* at the time of the capture was crossing the bar in thirteen feet of water, but had not yet entered the deeper water of the river nor arrived at the Spanish post, the balise. The balise was a house, built on pilings on a mud-flat island, where the pilots and some Spanish soldiers were stationed to prevent smuggling and to furnish incoming vessels with pilots. The capture of the *San Antonio* took place, depending on which testimony is believed, within gunshot of the Spanish post or perhaps as much as four miles below the post.⁴³

A pilot from the balise who was on board the *San Antonio* at the time of capture was unwillingly sent ashore by Captain Hayden of the *Patty*. When the Spanish commandant approached in his barge under Spanish colors, he was fired on by Hayden's men.⁴⁴

The captors sailed the *San Antonio* to Boston, where on December 25 they libeled the vessel in the maritime court for the middle district of Massachusetts, asserting that the *San Antonio* and its cargo belonged to British subjects, that the cargo was produced in Britain and loaded on board at London, that the *San Antonio* was carrying on a clandestine trade with

⁴⁰ J. R. ALDEN, *THE SOUTH IN THE REVOLUTION 1763-1789*, at 276-78 (1957); C. W. TEBEAU, *A HISTORY OF FLORIDA* 85-86 (1971).

⁴¹ *St. Antonio* (Debadie v. Russell), May 28, 1783, RCA #95. The passport and a copy of the capitulation are in the file of the *San Antonio*. For some reason, although there is frequent reference to Article fourteen of the capitulation as the controlling provision, in one copy of the capitulation itself it is clearly Article twelve.

⁴² Passport, May 4, 1782 and Charter Party, April 5, 1782, *San Antonio*, RCA #95.

⁴³ See the depositions and interrogatories of Dumont, Debadie, Brossard, Pickles, Rollinson, Martinez, Foglio, Fauchier, Bethel, Pollack, and Baker, *San Antonio*, RCA #95.

⁴⁴ Interrogatories of Debadie, Foglio, and Fauchier, *San Antonio*, RCA #95.

Spanish subjects while Spain was at war with Britain, that as cartel vessel sailing under flag of truce the *San Antonio* was prohibited by the rules of war from transporting British cargo, that the *San Antonio* was carrying on trade in contraband, and that the captain of the *San Antonio* carried double and false papers, some of which were destroyed at the time of capture. The libel asked the court to condemn the *San Antonio* and its cargo as lawful prize to the captors. The captors placed their reliance on "the Laws of this Commonwealth and the Acts of Congress of the United States, the Law of Nations, and the Rules of War."⁴⁵

Pierre Debadie, the first mate of the *San Antonio*, appeared in the maritime court on behalf of the owner of the ship and cargo. (Dumont, the captain, had apparently gone ashore in Louisiana after the capture and remained there.) Counsel for Debadie responded to the libel first by pleading that the Massachusetts court had no jurisdiction since the capture had taken place within the territorial jurisdiction of Spain, not on the high seas. Debadie also filed a claim on behalf of the owner. He asserted that the *San Antonio* and its cargo belonged to Spanish not British subjects, that the *San Antonio* was a Spanish flag of truce vessel returning from Great Britain with a cargo produced by the freight paid by Rushwegg, the capitulant from West Florida who had chartered it, and that the cargo was not contraband nor destined for the use of the English. Debadie asked the court to restore the vessel and cargo and award damages for its capture and detention as well as costs.⁴⁶

Don Juan Francisco Rendon, the Spanish *chargé d'affaires*, filed a petition with the court requesting restoration of the *San Antonio* to Spanish jurisdiction. He argued that the vessel had been within Spanish territorial waters when captured and that a Spanish officer had custody of the vessel when it was captured. Rendon concluded that the law of nations as well as the rights of Spanish sovereignty had been violated.⁴⁷

The court records give no indication of the legal arguments of the parties beyond the assertions of the pleadings. The interrogatories and depositions filed for the captors, however, clearly indicate the main lines of their arguments. The captors obviously thought that the place of the capture was crucial. Witnesses for the libellants stressed the fact that the *San Antonio* had not crossed the bar or reached the first Spanish outpost and thus was not within Spanish jurisdiction when captured.⁴⁸ The captors also provided

⁴⁵ Libel, signed by W[illia]m Tudor, [attorney] for the libellants, in file of *San Antonio*, RCA #95. Although libels are uniformly used in American prize suits, both in the vice-admiralty courts before the Revolution and in the state admiralty courts during the Revolution, libels were not filed in prize cases in the English High Court of Admiralty. Libels, which were appropriate in the nonprize, civil maritime cases (called instance cases), were employed in America in prize suits due apparently to the failure of the American bench and bar to distinguish between the prize and the instance sides of admiralty. See, *BOURGUIGNON*, *supra* note 11, Ch. IV and VI.

⁴⁶ Plea to jurisdiction and claim in file of *San Antonio*, RCA #95.

⁴⁷ Rendon's petition, in file of *San Antonio*, RCA #95.

⁴⁸ Deposition of Pickles, interrogatories of Baker, Fauchier, Rollinson, Santo Martinez, Foglio, Brossard, Casenwick, and Martini, in file of *San Antonio*, RCA #95. It is im-

witnesses who stated that the *San Antonio* had been an American vessel captured by the British and taken to Jamaica. Their witnesses identified the *San Antonio* as the property of Thomas Wilkins, apparently a Loyalist from one of the Southern states, who allegedly brought the ship from Jamaica to New Orleans. Wilkins, who had sailed as a passenger, along with the Rushwegg party, to London and returned to New Orleans, remained with the *San Antonio* after it was captured.⁴⁹ The mate and crew of the *San Antonio* insisted that Anthony Argote of New Orleans owned the vessel and cargo.⁵⁰ The captors, however, produced a witness who had unloaded the vessel in Boston and claimed there were suspicious secret markings on the packages, suggesting that the cargo, although in the name of Argote, really belonged to some other person (Wilkins).⁵¹ Wilkins, answering interrogatories for the Spanish claimants, asserted that he understood Argote was the owner of the vessel and cargo at the time of capture and admitted that he owned part of the cargo on the voyage to London. But the trial court refused to admit Wilkins' interrogatory, following the rule which rejected the testimony of financially interested parties.⁵²

Relying on such testimony, the jury returned a verdict stating that the *San Antonio* was British property when captured and that it "was employed in carrying on an illicit and contraband trade with the Enemies of the United States."⁵³ The maritime court on April 21, 1783, decreed that the *San Antonio* and its cargo were lawful prize and awarded them to the captors. Debadie gave the court oral notice of appeal to the Court of Appeals in Cases of Capture established by the Continental Congress.⁵⁴

A short time before the trial in the Massachusetts maritime court, the Congress in Philadelphia was made aware of the case of the *San Antonio* through diplomatic intervention. The French Minister to the United States, Anne Cesar, Chevalier de la Luzerne, forwarded to Congress irate letters from Governor Estevan Miro of New Orleans and from Antonio

portant to observe that much of the testimony allowed in the trial court would have been rejected under English prize practice. In the High Court of Admiralty, the rule was strictly enforced that "The evidence to acquit or condemn . . . must, in the first instance, come merely from the ship taken, viz. the papers on board, and the examination on oath of the master and other principal officers." *Report of the Law Officers of the Crown, 1753* in 2 DOCUMENTS RELATING TO LAW AND CUSTOM OF THE SEA 350 (R. G. Marsden ed. 1926). The American practice to the contrary, i.e., admitting in evidence the testimony of anyone remotely connected with the facts of the case or who could give testimony as to the maritime customs involved, is discussed in BOURCIGNON, *supra* note 11, Ch. IV.

⁴⁹ Depositions of Baker and Pickles, in file of *San Antonio*, RCA #95.

⁵⁰ Interrogatories of Debadie, Rollinson, Santo Martinez, Foglio, and Brossard, in file of *San Antonio*, RCA #95.

⁵¹ Deposition of Waldo, in file of *San Antonio*, RCA #95.

⁵² Interrogatory of Wilkins, in file of *San Antonio*, RCA #95.

⁵³ Verdict, in file of *San Antonio*, RCA #95. There is no evidence in the file as it exists today which would support the libellants' contention, accepted by the jury, that the *San Antonio* carried contraband or was carrying supplies to the British.

⁵⁴ The verdict and notice of appeal are in the file of *San Antonio*, RCA #95.

Argote, also of New Orleans, who claimed to be owner of the *San Antonio*. Luzerne in his covering note to Congress requested an investigation of the charges made in the letters. He expressed his confidence that, if the charges proved true, exemplary satisfaction would be demanded of the captors of the *San Antonio*. Luzerne's influence with Congress, of course, was no longer as overwhelming as it had been before Yorktown when Congress out of sheer desperation depended on the French alliance for survival. After Yorktown and after the news of the preliminary articles of peace which had just arrived, Congress still declared itself faithful to the French alliance, although Luzerne's influence on congressional decisions had lessened.⁵⁵

Governor Miro's letter to Rendon, the Spanish *chargé d'affaires*, which Luzerne forwarded, stressed that the capture violated the law of nations, since it took place in "the Port of a Friendly Prince" and since the *San Antonio* sailed under a flag of truce. Miro expressed special indignation at the insult to the Spanish flag when Captain Hayden's men fired on the commandant's barge, which had the "Royal Colours hoisted." Argote's letter, also forwarded by Luzerne, repeated the facts of the capture and objected to the violation of the law of nations which could "lessen the good harmony between the two countries." He demanded restitution of the vessel and damages for the value of the cargo at New Orleans prices plus damages for the expenses and loss of use of the vessel. The record also includes a group of depositions from New Orleans to prove Argote's purchase of the *San Antonio* at New Orleans. These depositions apparently were carried by Argote and forwarded to Massachusetts along with the letters.⁵⁶

Congress responded with a resolve informing Argote that the proper mode to obtain redress was by due course of law. Congress instructed its president to write to the Governor of Massachusetts, enclosing copies of the correspondence, with a request for protection and assistance for Argote in his attempts to obtain legal satisfaction. President of Congress Boudinot wrote Governor Hancock on April 8, 1783, forwarding the correspondence and requesting his help for Argote in the trial there. Boudinot told Hancock that "this unprovoked violation of the law of nations (if clearly

⁵⁵ In the letter of Elias Boudinot, the President of Congress, to John Hancock, the Governor of Massachusetts, forwarding Luzerne's letter with its enclosures on the *San Antonio* affair, Boudinot included a postscript that news of the preliminary peace articles had just arrived. Letter of April 8, 1783, in file of *San Antonio*, RCA #95. For a discussion of Luzerne's influence with Congress, see W. C. STINCHCOMBE, *THE AMERICAN REVOLUTION AND THE FRENCH ALLIANCE* 134, 153-69, 183-99 (1969).

It is interesting to compare the business-like manner in which Congress responded to Luzerne in 1783 with the extended and agonized involvement of Congress in the case of the Portuguese snow *Our Lady of Mount Carmel and St. Anthony* in 1778 and 1779. 7 Ford JCC 318; 10 *id.* 227; 11 *id.* 487; 13 *id.* 56, 73, 78, 158; 14 *id.* 803, 838-42, 856-60. See also PCC Item 44 at 1-185.

⁵⁶ Miro's letter of December 5, 1782, Argote's letter of March 25, 1783 written in Philadelphia, and the depositions from New Orleans, dated in December 1782, are all in the file of *San Antonio*, RCA #95.

proved) calls loudly for the interference of Government, and is therefore submitted to the consideration of a Committee of Congress, as far as respects the injury done to the Flag of His Most Catholic Majesty."⁵⁷ There is no indication whether this diplomatic and congressional intervention arrived in Boston before the jury reached its verdict eleven days later.

The Massachusetts jury determined that Massachusetts privateers had made a lawful seizure of a vessel, claimed as Spanish property, allegedly sailing under flag of truce, and captured in Spanish waters. Counsel on both sides, as well as Congress and the foreign diplomats, all agreed that the legality of the capture should be determined by the law of nations. Congress decreed in general that the rule of decision in all American prize courts should be the ordinances of Congress, public treaties, and the law of nations "according to the general usages of Europe." This was the practice of the appellate prize court Congress established.⁵⁸ In England, likewise, the law of nations was clearly stated to be the rule of decision in prize cases.⁵⁹

The law of nations, of course, did not consist of a corpus of statutory provisions or court-made precedents. In the eighteenth century it consisted largely of discussions of general philosophical principles derived ultimately from the natural law. Man's natural reason, this natural law philosophy taught, could perceive from the order of nature an ideal system of law binding on all men and all nations. Different writers reached conflicting conclusions when they applied their individual reasons to the specific problems of the relations between nations. Nonetheless there was a widespread belief in the eighteenth century that the rationality of the universe provided a source of obligation governing all human conduct.⁶⁰

In the case of the *San Antonio*, attorneys, confronted with the detailed facts of their clients' case, developed arguments based on the classical writers on the law of nations. It is largely through such arguments of counsel, accepted, amplified, or adapted by the court, that the principles of the law of nations became incorporated in American law.

Debadie had given notice of appeal from the maritime court decree on April 21, 1783. By the middle of May the parties had produced their witnesses in Philadelphia to give depositions for the Court of Appeals and had stipulated that new evidence could be admitted for the appeal.⁶¹ The stipulation apparently was unnecessary since the Court of Appeals often received depositions specially taken for the appeal, at times taken before

⁵⁷ The resolve of Congress, dated April 4, 1783 and the letter of Boudinot to Hancock are in the file of *San Antonio*, RCA #95.

⁵⁸ 21 Ford, JCC 1158. The reliance by the congressional appellate court on the law of nations is discussed in BOURGUIGNON, *supra* note 11, Chs. V and VII.

⁵⁹ Lord Mansfield in *Lindo v. Rodney*, 2 DOUGLAS, REPORTS, 613, 616; 99 ENGLISH REPORTS, 385, 388; *Report of the Law Officers of the Crown*, *supra* note 48, at 350, 353, 369.

⁶⁰ See, for instance, J. L. BRIERLY, *THE LAW OF NATIONS* 14-40 (6th ed. 1963).

⁶¹ Stipulation among the papers from the Massachusetts maritime court, in file of *San Antonio*, RCA #95.

one of the judges of the appellate court.⁶² An appeal, therefore, was regarded as a trial *de novo* and was not limited to the record from the court below.

The newly submitted depositions for both parties were, with one exception, by witnesses who had not furnished them for the original trial. Most of these new depositions would not have been admitted under English prize practice since they were by individuals unconnected with the capture. They gave testimony for the captors to attempt to strengthen the arguments made in the trial court: that Thomas Wilkins owned the *San Antonio* and that the place of capture was outside Spanish waters.⁶³ The depositions for the Spanish claimants, on the other hand, explained the business of the *San Antonio* at London and reiterated that Argote owned the vessel and cargo when it was captured and that the capture took place within cannon shot of the balise.⁶⁴ These depositions for the Court of Appeals were taken before a justice of the peace or before a judge of the Court, with counsel for both parties present and asking questions. Several of these depositions were taken after the Court heard oral argument.

On May 16, just three and a half weeks after the decree of the Massachusetts maritime court, the Court of Appeals heard oral argument. Although oral argument was undoubtedly heard in most of the one hundred or so cases which came before the congressional appellate court, a record of such argument has survived in only two cases, the case of the *San Antonio* and of the brig *Lusanna*.⁶⁵ Since prompt action was seldom characteristic of the Court, the speedy action here (the Court decided the case on May 28, just five and a half weeks after the trial court decree) might be explained by the diplomatic and congressional intervention, or perhaps by the fact that counsel for the parties presented their witnesses and the trial record at a time when the Court was sitting and could hear the case.⁶⁶

In English appellate prize practice, the advocates and barristers for each party before the Lords Commissioners for Prize Appeals filed a printed "case," which stated the facts of the capture, the details of the trial, and excerpts from the relevant documents. The "case" concluded with a section called "reasons" which stated in brief form the issues which counsel would argue orally.⁶⁷

⁶² See, e.g., the file of *Hope* (Lopez v. Brooks), April 10, 1779, RCA #28; *Lark* (Jennings v. Taylor), Jan. 28, 1780, RCA #36; *George* (Jennings v. Griffin), Dec. 23, 1780, RCA #40; *Hannah* (Hepburn v. Ellis), Aug. 4, 1781, RCA #74.

⁶³ Depositions of Bethel and Douglass, in file of *San Antonio*, RCA #95.

⁶⁴ Depositions of Pollock, Vincent, Bousigues, Pickles, and Captain Dumont, the commander of the *San Antonio* when captured, in file of *San Antonio*, RCA #95. Two of these depositions were translated from the French, and the record includes the French originals.

⁶⁵ *Lusanna* (Doane v. Penhallow), Sept. 17, 1783, RCA #30. This case is discussed in 2 LEGAL PAPERS OF JOHN ADAMS 356-72 (L. K. Wroth & B. Zobel eds. 1965) and in BOURGUIGNON, *supra* note 11, Chs. VII and VIII.

⁶⁶ From May 13 to June 14, 1783, the Court of Appeals determined ten cases, and did not sit again until September when it decided another nine cases. RCA *passim*.

⁶⁷ BOURGUIGNON, *supra* note 11, Ch. IV.

Only in three cases did the American Court of Appeals receive anything comparable to a written "case."⁶⁸ The Court of Appeals wrote an opinion only rarely; the decrees of the Court gave no explanation of the reasons for its determination. In order to understand the legal principles applied by the Court of Appeals, therefore, it is necessary to scrutinize closely the few scraps of evidence which have survived. A few notes on the oral argument, which could have been made by the judge, the registrar, or possibly one of the co-counsel, provide us with such evidence in the case of the *San Antonio*. In reaching its decision, the Court of Appeals in this case must have been swayed by arguments of counsel,⁶⁹ which were based largely on the law of nations. The notes suggest that only Morton, Lewis, and Wilson presented the oral argument.

The argument revolved around the following issues: First, if the *San Antonio* was captured in Spanish waters and if Spain was a neutral, the capture was illegal even if the *San Antonio* was a British vessel. The status of Spain vis à vis the United States was not clear at the time of the capture. Spain had entered the war against Great Britain but had refused to enter into an alliance with America. Was Spain to be considered as an ally or a neutral? Was the capture within Spanish waters? Second, if the *San Antonio* was protected by a valid passport, it could not be legally captured anywhere, provided it remained within the limits of the voyage described in the passport. The Pensacola capitulation agreement did not state that the departing British subjects had to charter Spanish vessels, so the issue remained open whether Spanish authorities could give protection by a passport to a British vessel. Finally, was the *San Antonio* British property? If the *San Antonio* was in reality a British vessel and not protected by

⁶⁸ *Polly and Nancy* (Norris v. Porter), Aug. 14, 1778, RCA #25; *Mary* (Smith v. Hinson), May 6, 1784, RCA #73; *Chester*, (Dubbeldemuts v. Atkinson), May 3, 1787, 2 Dall, RCA #41. For the petition in the case of the *Chester*, written by Hamilton, see 2 THE LAW PRACTICE OF ALEXANDER HAMILTON, DOCUMENTS AND COMMENTARY 892-903 (J. Goebel, Jr. ed. 1969).

⁶⁹ The appellant, Debadie, the named party for the interests of Argote, was represented by Perez Morton, William Lewis, Benjamin Hichborn, and another counsel whose name is illegible, perhaps Joseph Reed. Morton and Hichborn of Massachusetts had represented the Spanish claimants and Rendon, the *chargé d'affaires*, at the trial. Lewis and Reed were from Philadelphia where the appeal was heard. The appellees, the captors, were represented by James Wilson of Philadelphia and another counsel, "Loel," perhaps John Lowell of Massachusetts, who was then one of the three judges of the Court of Appeals. This would explain why the case was decided by the other two judges, Cyrus Griffin of Virginia and George Read of Delaware.

The names of counsel are included on the notes of the oral argument, *San Antonio*, RCA #95. Since no pleadings or briefs were filed with the Court of Appeals, it is frequently impossible to determine whether the parties were represented before the Court of Appeals by trial counsel or by special counsel to argue the appeal. If it is possible to speak of a special bar for the appellate prize court, William Lewis and James Wilson would certainly be among its leaders. Lewis is known to have represented parties in at least nineteen appeals. Wilson served as judge on the Committee on Appeals, the predecessor of the Court of Appeals, in at least ten cases, and as counsel in six other appeals. RCA *passim*.

a valid passport, it could be legally captured by an American privateer on the high seas.⁷⁰

The notes state that the argument for the Spanish claimants, the appellants, began with a rehearsal of the justification for the capture as stated by the Massachusetts captors in their libel: the *San Antonio* was captured from the British; it carried British products as cargo loaded at London; it was in the employ of British subjects; it was engaged in contraband trade; and it carried double and false papers, some of which were destroyed or concealed.⁷¹ Counsel for the Spanish claimants then summarized the key legal objections to the capture: the capture was made within Spanish territorial waters; the vessel and cargo belonged to a Spanish subject, that is, Argote who had chartered the vessel to British subjects according to the terms of the capitulation of Pensacola; and the *San Antonio* was a flag of truce vessel.⁷²

The basic argument of the Spanish claimants was that the capture took place within the territorial jurisdiction of Spain. Morton, the counsel for Spain, relied entirely on the principles stated in Emmerich de Vattel's *The Law of Nations*.⁷³ When lakes and rivers increase by gradual development, Vattel had stated, the increase belongs to the nation which owns the body of water. Similarly, the shores of the sea clearly belong to the nation

⁷⁰ In the case of the *San Antonio* there never appears to have been a question whether the cargo, as British property, was liable to lawful capture even if the vessel was Spanish property not liable to seizure. The ordinary rule of the law of nations, unless modified by treaty, was that the property of an enemy on board a neutral ship could be seized and condemned to the captor as lawful prize. (VATTEL, Fenwick tr., *infra* note 73, at 273). After the Armed Neutrality of 1780, however, Congress issued new instructions for privateers which, following the principles of the Armed Neutrality, prohibited the seizure of enemy property found on board a neutral vessel. 18 Ford, JCC 864-66, 905-06, 1008, 1097-98; R. B. MORRIS, *THE PEACEMAKERS* 164-67 (1966). This issue, apparently, was never raised in this case.

⁷¹ That vessels engaged in maritime commerce in time of war carried double or false papers and destroyed incriminating papers when captured was a constant problem. It was used as one of the presumptions which often served as a basis of condemnation in English practice. Perjured testimony and forged documents must have been so common that the British Lords Commissioners for Prize Appeals, as well as the admiralty judges, developed a system of presumptions, common sense rules, to help determine whether a vessel should be condemned or acquitted. 2 A. BROWNE, *A COMPENDIOUS VIEW OF THE CIVIL LAW* 451-52 (1802). Although Browne wrote a generation after the American Revolution (the first edition came out in 1798), the prize procedures had not changed significantly in the intervening years. See also 1 *NEUTRALITY—ITS HISTORY, ECONOMICS AND LAW* 224-46 (P. C. Jessup ed. 1935).

⁷² The argument of counsel is reconstructed from the notes of oral argument, in file of *San Antonio*, RCA #95.

⁷³ VATTEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* (1758). The references in the "notes" are undoubtedly to the English translation published in London in 1759-1760, which is here cited in subsequent footnotes. To make these references more accessible, parallel citations to the pages of the 1916 translation of Vattel by C. G. Fenwick are also given. The Fenwick translation (hereinafter Fenwick tr.) is part of the series, *THE CLASSICS OF INTERNATIONAL LAW* (J. B. Scott ed., reprinted 1964).

which possesses sovereignty over the adjacent territory. Ports and harbors even more clearly, Vattel wrote, are part of the nation's territory. When small bays and straits can be effectively possessed, they belong to the neighboring state. If the entrance of a bay can be defended, the bay can be possessed. It is important for a nation to claim sovereignty over such bays, Vattel noted, since it can more easily be insulted in such waters. Even straits connecting two seas can be possessed by a nation, although the nation should allow innocent passage by foreign vessels through the straits.⁷⁴ Although the notes fail to indicate what counsel derived from these principles, he must have concluded that the entire mouth of the Mississippi was subject to Spanish control, not just that part of the river above the bar. The mouth of the Mississippi did not fit clearly into any of the categories of territorial waters discussed by Vattel, but by analogy it should be considered under Spanish sovereignty. At least the place of capture was within Spanish sovereignty, since it was within cannon shot of the Spanish outpost and thus within Spain's effective control.

Morton concluded that, even if the vessel and cargo had been British, their capture within Spanish jurisdiction was illegal. Vattel had insisted that an enemy may be treated as such wherever he is found, except when he is encountered in the territory of a neutral. "[A] neutral prince will not allow [belligerents] to use any violence in his territories." Similarly enemy property cannot be attacked in neutral territory. When a neutral state allows belligerents to enter its territory, it must guarantee their safety, Vattel stated. Therefore, "as strangers can do nothing in a country against the sovereign's will, to attack an enemy in a neutral country, or to commit in it any other hostility, is absolutely unlawful."⁷⁵ To prevent such acts of hostility, a neutral state can refuse to allow belligerent troops to pass through its territory.⁷⁶ The place of the capture, within neutral territory, therefore, gave absolute immunity from capture, even if the property belonged to the enemy.

The argument faced the obvious reply that these principles, derived from Vattel, applied only to neutral territories and that Spain was not a neutral. Presumably one belligerent could seize the property of an enemy within the territory of an ally who was at war with the same enemy; the United States could lawfully capture British property within French territory. Although Spain had not entered into an alliance with America, it had entered the war against Britain. Morton sought to clarify the legal implications of Spain's position. He turned to Vattel's discussion of who are allies and pointed out the distinction between offensive and defensive alliances. Apparently Morton was arguing that Spain did not fit into any of Vattel's definitions of an ally. It had not entered into an offensive or de-

⁷⁴ 1 VATTEL, I, Ch. XXII, §§ 275, 276, Ch. XXIII, §§ 290, 291, 292, 294; Fenwick tr., 104-05, 109-10.

⁷⁵ 2 VATTEL, III, Ch. V, §§ 71, 74, Ch. VII, §§ 131, 132; Fenwick, tr., 259, 277. The quotation is from the translation of 1760.

⁷⁶ 2 VATTEL, III, Ch. VII, §§ 120, 129; Fenwick tr., 274, 276.

ensive treaty and it had not provided auxiliary troops,⁷⁷ so Spain must be viewed as a neutral with respect to America. The notes here are deficient; they give no indication of how Morton developed this part of his argument.

Morton, still relying on Vattel, discussed the postliminary right. Vattel defined *postliminium* as the right by which persons and things captured by an enemy are restored to their former status when they come again under the powers of their own nation. Recapture of a vessel from possession of the enemy captors is a clear example. The recaptured vessel must be restored to its original owner. Vattel stated the general rule of *postliminium*:

Persons return, and things are recovered, by the right of postliminium, when after being taken by the enemy, they come again under the power of their own nation. . . . Thus, this right takes place, as soon as such persons or things taken by the enemy fall into the hands of soldiers belonging to the same nation, or are brought back to the army, the camp, their sovereign's territories, or the places under his command.

This right of *postliminium* has no force among neutrals, Vattel declared.⁷⁸

Morton must have argued along these lines: If Spain should be held not to be a neutral with respect to America, nonetheless the *San Antonio* was not liable to capture when it returned to Spanish territory in the mouth of the Mississippi. Even conceding that during its voyage it had been under English control because of the charter to Rushwegg and because it carried British products, still its return to Spanish territorial waters completely restored the vessel and cargo to Spanish ownership. This is not the usual context in which *postliminium* was considered. Spain's extraordinary posture in the war, however, forced counsel to argue that *postliminium* should be applied even in the case of a Spanish vessel returning to Spanish territory with a cargo of British goods after a voyage to London.

Lewis continued the argument for the Spanish claimants and restated the principal argument: If the capture by Captain Hayden was made within Spanish territories, it was unlawful. Spain was neutral with respect to the war between Great Britain and America, he said, turning to Vattel to support these propositions. Vattel had enunciated the general proposition that nations, like men, are free and independent of each other. Each nation, therefore, should be "left in the peaceable enjoyment of that liberty it has derived from nature." The rights of each nation must be respected. Every nation, therefore, must judge what its conscience demands, what is proper, and what improper. When a nation judges what its duty demands, Vattel concluded, no other nation can oblige it to act in any other manner.⁷⁹ Lewis must have argued that since Spain refused to be an ally of America, it must be regarded as a neutral even after it entered war against Britain.

⁷⁷ 2 Vattel, III, Ch. VI, §§ 78, 79, 81, 82, 83; Fenwick, tr., 261-62.

⁷⁸ 2 Vattel, III, Ch. XIV, §§ 204, 205, 206, 208; Fenwick, tr., 313-14. The quotation is from the translation of 1760.

⁷⁹ 1 Vattel, Preliminaries, §§ 15, 16, at 5; Fenwick tr., 6.

Lewis applied these basic propositions to the facts of this case. Vattel had stated:

Whoever offends the state, injures its rights, disturbs its tranquility, or does it a prejudice in any manner whatsoever, declares himself its enemy, and puts himself in a situation to be justly punished for it. . . . [The] sovereign should avenge the injuries, punish the aggressor, and, if possible, oblige him to make intire satisfaction.⁸⁰

Lewis, echoing the indignant letters from the Spanish authorities, presumably pointed out to the Court the enormity of Hayden's crime against Spain of capturing the vessel in Spanish waters while a Spanish pilot was aboard and then of firing on the commandant's barge sailing under Spanish colors. Spain, Lewis must have concluded, rightly demanded restitution of the *San Antonio* and a fitting punishment for the captors.

Lewis finally drew the Court's attention to the significance of the passport granted to the *San Antonio*. He relied on J. J. Burlamaqui, who had described a safe conduct as "a privilege granted to some person of the enemy's party, without a cessation of arms; by which he has free passage and return, and is in no danger of being molested." Burlamaqui explicitly added that the permission to go to a certain place implied the permission to return.⁸¹ Even if the *San Antonio* had been seized on the high seas, therefore, the capture was illegal because the vessel was protected from capture by a passport. Lewis continued with a reference to Vattel on the subject. Vattel had written that the sovereign can delegate the power to grant safe conducts; generals, from the nature of their office, can grant safe conducts.⁸² Therefore, Lewis apparently argued, Galvez, as Commander-in-Chief of Spain's forces in Louisiana, had the authority to enter into the Pensacola capitulation agreement, and Governor Miro, acting as Galvez's lieutenant, could grant Argote the passport. This brief discussion of the passport granted to the *San Antonio* concluded the argument of counsel on behalf of the Spanish claimants.

The notes seem to indicate that only Wilson spoke for the captors.⁸³ Wilson first considered the claim, filed by Rendon, the Spanish *chargé d'affaires*, in which Rendon objected to the jurisdiction of the Massachusetts court. Wilson argued that Rendon's plea to the jurisdiction of the court was defective. In the first place, Wilson insisted, when a party objects to the jurisdiction of one court, he must indicate when and where proper jurisdiction lies.⁸⁴ Furthermore, Rendon had alleged in the claim that the

⁸⁰ 1 VATTEL, II, Ch. VI, § 71; Fenwick, tr., 136. The quotation is from the translation of 1760.

⁸¹ The page reference in the notes of the argument makes it clear that Lewis referred to the 1763 translation of Burlamaqui. J. J. BURLAMAQUI, 2 THE PRINCIPLES OF NATURAL AND POLITIC LAW 340 (Nugent tr. 1763).

⁸² 2 VATTEL, III, Ch. XVII, § 266; Fenwick tr., 331.

⁸³ The notes for Wilson's argument are unclear in places; it is not easy to follow the flow of his argument. The reconstruction of the argument, therefore, is at times quite speculative.

⁸⁴ Although no citation is given for this proposition, Wilson perhaps was relying on Lord Mansfield's opinion in *Mostyn v. Fabrigas*, 1 Cowper 161, 172; 98 English Re-

San Antonio, when captured, was in the custody of the proper Spanish officer appointed to search all vessels entering into the Mississippi to prevent breaches of the Acts of Trade.⁸⁵ Wilson argued that this temporary control of the vessel by a pilot was not sufficient to constitute a basis of exclusive jurisdiction. Absolute ownership is essential to exclusive jurisdiction. To establish this point Wilson turned to T. Rutherforth's *Institutes of Natural Law*. Rutherforth had stated that "Whatever does not admit of full property or absolute ownership, cannot be a part of the territory or under the jurisdiction of a nation."⁸⁶ Furthermore, Wilson contended, if Rendon's claim should succeed, the Spaniards would have authority to stop and examine all American vessels going into the Mississippi. Here Wilson introduced a policy argument with broad ramifications.

Spain had regarded the American Revolution with sullen detestation; its fear and abhorrence of an independent, necessarily hostile American neighbor to its colonies increased with the prospect of success for the American cause. Spain, in negotiations with the Americans, was adamant in insisting on control of both banks of the Mississippi. For the American settlers moving west, on the other hand, free navigation of the Mississippi was the essential key to open the western interior (west of the Appalachians) to national or world commerce.⁸⁷ The Eighth Article of the Preliminary Articles of Peace, signed at Paris on November 30, 1782, stated that:

The Navigation of the River Mississippi from its source to the Ocean shall for ever remain free and open to the Subjects of Great Britain and the Citizens of the United States.⁸⁸

ports 1921, 1928 (1774). The first edition of Cowper had just been published in 1783. Mansfield had stated:

In every plea to the jurisdiction, you must state another jurisdiction; therefore, if an action is brought here for a matter arising in Wales, to bar the remedy sought in this Court, you must shew the jurisdiction of the Court of Wales.

This is a clear example of the way common law rules were often introduced into these prize proceedings.

⁸⁵ Rendon's claim, file of *San Antonio*, RCA #95.

⁸⁶ 2 T. RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 488 (1754). Rutherforth is speaking here of the acquisition of power or jurisdiction over a territory by occupation.

⁸⁷ MORRIS, *supra* note 70, at 219-26, 232-40, 243, 306, 424. James Madison had prepared a report, adopted by Congress, asserting the right to the east bank of the Mississippi for most of the length of the river, and the right of innocent passage through the mouth of the river, both banks of which would be under Spanish control. Madison relied on arguments from Vattel to establish the rights and usages of nations. When John Jay, at the Spanish court, read the report, he informed Madison that Spain had different ideas of international law than Congress; Vattel's *Law of Nations* was prohibited there, Jay told Madison. *Id.* 239. See also STINCHCOMBE, *supra* note 55, at 33, 36. A long letter from John Jay, in Paris, to Robert R. Livingston, the American Secretary of Foreign Affairs, dated November 17, 1782, eight days before the capture of the *San Antonio*, discussed the problem of America's assertion of a right of navigation of the Mississippi. 6 *THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES* 11-49 (F. Wharton ed., 1889).

⁸⁸ Reproduced in Appendix to S. F. BEMIS, *THE DIPLOMACY OF THE AMERICAN REVOLUTION* 263 (reprint, 1957).

Spain, after the peace treaty, controlled both banks of the Mississippi to the 31st parallel and so the mouth of the river. Thus the Eighth Article of the Treaty did not by itself open the entire Mississippi to free trade for the American settlers. American insistence on free navigation of the entire river remained a burning issue.⁸⁹ Wilson had shrewdly introduced into the oral argument the unpleasant consequences of conceding to Spain the right of search in the mouth of the Mississippi:

Wilson, before developing this policy argument, next discussed some general propositions concerning the law of nations. He cited Rutherford again to demonstrate that prize questions must be determined by the law of nations, not the law of the state where the capture occurred. "The only law, by which [a prize] controversy can be determined, is the law of nature applied to the collective bodies of civil society, that is, the law of nations."⁹⁰ The law of nations, Rutherford stated, is also the legal basis for determining disputes between nations as to the extent of their territory.⁹¹ Wilson explained to the Court what he meant by the law of nature. He derived his definition from Samuel Pufendorf's *Of The Law of Nature and Nations*.⁹²

After educating the Court as to these familiar fundamental principles, Wilson returned to the policy reasons why Spain's exercise of exclusive control over the mouth of the Mississippi should not go unchallenged by America. This nation, Wilson told the Court, now that it is independent, must see to it that the law of nations is not violated. He quoted from Vattel, who had said that any nation which without title arrogates to itself an exclusive right to the sea and supports this claim by force injures all nations whose rights it violates. All nations have a great interest in causing the law of nations, the basis of their tranquility, to be universally respected.⁹³ Wilson drew from this the proposition that navigable rivers must be kept open for the benefit of all nations. Wilson next stressed the point that Rendon's claim had admitted the capture took place in the mouth of the river. Apparently Wilson insisted that the capture was not in the river itself.⁹⁴

With these broad fundamentals before the Court, Wilson raised the question: To whom do navigable rivers belong? Rutherford, Wilson ob-

⁸⁹ MORRIS, *supra* note 70, at 423-24; F. W. MARKS, *INDEPENDENCE ON TRIAL* 21-33, 105-08 (1973).

⁹⁰ 2 RUTHERFORTH, *supra* note 86, at 596-97. Rutherford, in this same passage, also stated that the state to which the captors belong had exclusive jurisdiction to try the capture. But he explicitly limited this to cases where the capture took place on the high seas. It is not clear that Wilson mentioned this question.

⁹¹ *Id.* 479-80.

⁹² There were, by 1783, seven English translations of Pufendorf. It is not clear which English edition Wilson was relying on.

⁹³ 1 VATTEL, I, Ch. XXIII, §283. Fenwick tr., 106-07. The notes of the argument incorrectly give the citation as "Vat. Lib: 1, Sec: 183." Clearly Section 283 was meant.

⁹⁴ This point that Wilson makes does not seem to fit into the flow of his argument, but the notes clearly indicate that it was made at this part of the argument. Undoubtedly it was developed in a way that is not now apparent.

served, had written that territorial jurisdiction extends into the sea only to the low watermark, or perhaps to the reach of a cannon shot. Beyond this a nation has no jurisdiction because the sea is "an uncertain and indeterminate thing, [which] will not admit of such occupancy."⁹⁵ Presumably Wilson applied Rutherford's position to the waters of the Mississippi. Wilson also cited Hugo Grotius, apparently for the proposition that the sea cannot become subject to private ownership. Liquids, Grotius had contended, cannot be possessed unless contained in something else, such as lakes or ponds or rivers restrained by banks. A river, Grotius stated, belongs to the people through whose territory it flows. But rivers which have become subject to ownership by a people ought to be open to others who, for legitimate reasons, have need to sail through the territory. No one has the right to hinder a nation from carrying on commerce with any other nation.⁹⁶ Wilson concluded with a bold statement which goes far beyond any principles derived from the sources he had cited. If we have a right to trade down the Mississippi in time of peace, he said, the same right gives us liberty to make captures in time of war. Wilson here seems to have given up any hope of showing that the capture took place outside the territorial jurisdiction of Spain. Although the citations at this point became undecipherable,⁹⁷ Wilson apparently argued that America had the right to navigate the entire Mississippi, so the place of capture was irrelevant. Wilson pointed to the peace treaty, the preliminary articles of which were signed five days after the capture of the *San Antonio*, and quoted Article Eight of the treaty, which provided that navigation of the Mississippi would be free from its source to the sea. Wilson added, according to the notes, "which Right was transferred to Spain," as though Spain's right to the use of the river somehow derived from the Anglo-American treaty.

Wilson again turned to Vattel to bolster his position on America's right to the Mississippi. Vattel spoke of rivers which form boundaries between two nations. The nation first occupying the country terminated by the river appropriates the river. A river is of such importance, Vattel said, that it is presumed the nation occupying the adjacent territory intended to reserve the river to itself. If this nation has used the river for navigation or fishing, its appropriation of the river is presumed with greater certainty.⁹⁸

⁹⁵ 2 RUTHERFORTH, *supra* note 86, at 493.

⁹⁶ 2 GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 190-91, 196-97 (F. W. Kelsey tr., 1925). Unfortunately, the citation to Grotius in the notes of the argument could not be traced any more precisely than to Book II, Chapter II, which includes a discussion of many questions relating to occupation of seas and rivers. Furthermore, the next chapter of Grotius contains many points which would not be helpful for Wilson's argument, especially that rivers can be acquired by occupation and that a part of the sea (such as the mouth of the Mississippi) which is enclosed by shores may be possessed by a nation. *Id.* 208-12.

⁹⁷ There are cites here to Vattel, Pufendorf, and Grotius, which are either illegible or so inaccurate that they cannot be traced.

⁹⁸ 1 VATTEL, I, Ch. XXII, §266; Fenwick tr., 102.

Of course, Wilson could only make this argument for the river above the 31st parallel. Below that point, and especially below New Orleans, Spanish occupation was too obvious to dispute. Presumably Wilson must have been continuing his policy theme, asserting the right of Americans to navigate the entire river because Americans occupied the territory on one bank of most of the course of the river and because Americans used the river for navigation. America's acquisition of the river by occupation and use has now been confirmed by the peace treaty, Wilson argued, again relying on Vattel and Rutherford.⁹⁹

Wilson then turned to the record to establish factual deficiencies in the claimants' case. He tried to convince the Court that the entire voyage was merely to conceal the true situation: Wilkins, the British owner, by false, misdated papers used Argote's name to hide his ownership and provide a legal cover for his illegal, secret trade between London and New Orleans. The ship's register was improper. Argote failed to provide adequate documents from New Orleans to prove his ownership. Rendon's plea was insufficient because he had not been properly authorized to take charge of Spanish affairs. Although some of the documents Wilson referred to are no longer in the record, one gets the impression of an attorney desperately picking at the record because he realizes the law is not favorable to his client.

At this point the notes interpose three questions, possibly raised by Wilson himself or perhaps posed by the Court. The questions, which forced Wilson to focus more closely on the arguments of the Spanish claimants, were: What is the significance of the protection of the *San Antonio* by a flag of truce? Was the capture made within Spanish jurisdiction? Did the vessel and cargo belong to Spanish subjects? If these questions were raised by the Court, apparently Wilson's policy argument had not impressed the judges, who now were trying to steer him back to the appropriate issues. The answers to these questions are elliptical and confused. Either the notetaker had wearied or the speaker rambled.

The *San Antonio* was not entitled to the protection of a flag of truce, Wilson replied to the first question. Wilson turned to the letter of Governor Miro of New Orleans, part of the diplomatic correspondence already discussed. According to this letter, Wilson observed, the vessel allowed for the Pensacola capitulants had to be Spanish property. Since the *San Antonio* was British property, Wilson argued, it could not receive the protection of a passport. Furthermore, according to Wyndham Beawes, in his *Lex Mercatoria*, passports are granted to friends, while safe conducts are properly granted to enemies.¹⁰⁰ Therefore, Wilson apparently argued,

⁹⁹ 2 VATTEL, III, Ch. XIII, §197, Ch. XIV, §212; Fenwick tr., 308, 315; 2 RUTHERFORTH, *supra* note 86, at 567-68.

¹⁰⁰ BEAWES, *supra* note 9, at 242 (3rd ed. 1771). Miro's letter is in the file of *San Antonio*, RCA #95.

the passport granted to this British vessel was improper and did not protect it from capture.¹⁰¹

To the second question Wilson apparently made a double response. First of all, he reiterated his previous argument: The capture took place within American jurisdiction. But even acknowledging Spanish jurisdiction over part of the river, the capture here took place below the mouth of the river. Wilson asserted that the mouth is where the river "disembogues"¹⁰² and divides itself into different channels. This was three or four miles above the place of the capture, Wilson concluded. The capture took place at the bar, and, Wilson insisted, the bar cannot be above the mouth.

Finally Wilson replied to the third question, apparently repeating the argument already outlined, that the *San Antonio* belonged to British, not Spanish subjects.

The court needed little time for reflection. As already mentioned, several depositions were taken after the court heard the oral argument.¹⁰³ On May 28, 1783, twelve days after the argument, the court issued its decree, as usual with no indication of the reasons for the determination. It reversed the decree of the Massachusetts court and ordered the *San Antonio* and its cargo restored to Debadie for the benefit of Argote. The court also ordered the captors to pay trial and appellate costs and \$1000 damages for the capture and detention of the vessel.¹⁰⁴ Since the court rarely granted costs and only in this case awarded damages, it must have been convinced by the argument of Morton and Lewis that the captors had committed a most serious breach of the law of nations.

Congress, still aware of the diplomatic intervention of Spain and France, added its weight to the decree of the Court of Appeals. By a unique resolve of June 10, 1783, Congress forwarded to the Governor of Massachusetts the decree of the Court. Congress requested an enquiry into possible criminal charges against the owners and captain of the *Patty*, which had captured the *San Antonio*, for the injury done to the Spanish flag. Congress sent copies of the resolve and of the Court's decree to Luzerne and to the Governor of New Orleans.¹⁰⁵ Undoubtedly this case had aroused intense feelings among the Spanish, which Congress hoped to allay.

But Congress had not heard the last of this case. At the end of June the owners of the *Patty* sent a long petition to Congress, narrating their version of the facts and requesting another hearing before the Court of Appeals. The owners of the *Patty* were particularly outraged that the court had admitted in evidence the diplomatic correspondence and had awarded dam-

¹⁰¹ The notes indicate that Wilson also argued that making use of a flag of truce is an acknowledgment of the property's being British. The logic of this argument is not apparent.

¹⁰² Wilson also apparently answered the Spanish claimants' argument that the *San Antonio* was within Spanish jurisdiction because it was in the custody of Spanish officers. The notes merely mention that something was said on this subject, but give no indication of how Wilson argued.

¹⁰³ Deposition of Bousigues and Dumont, in file of *San Antonio*, RCA #95.

¹⁰⁴ Decree signed by Cyrus Griffin and George Read, in file of *San Antonio*, RCA #95.

¹⁰⁵ 24 Ford, JCC 386-87.

ages apparently based on the accusations made in this correspondence. The petitioners contended that the Court of Appeals did not have the authority to award damages. The petition was read in Congress on August 15, which took no action until September.¹⁰⁶

During the summer of 1783, Dumont, the captain of the *San Antonio*, brought suit in a Massachusetts common pleas court against the owners of the *Patty*. He sought £700 damages for the loss of his personal property taken from onboard the *San Antonio*. Although the original jury awarded Dumont £400 damages, the jury on appeal in 1786 ultimately found the owners of the *Patty* not guilty and taxed costs against Dumont.¹⁰⁷ The decree of the Congressional Court of Appeals was not included in the file of this common law suit, although one would have expected it to be basic to Dumont's case. Whatever the meaning of the suit by Dumont—and the inadequate file makes it difficult to interpret—one does get the impression that the local litigants enjoyed a substantial advantage in their own courts.

The other Spanish litigants, Debadie and Argote, had no greater success in Massachusetts than did Captain Dumont. When their agent presented the owners of the *Patty* with an authenticated copy of the decree of the Court of Appeals, the owners of the *Patty* refused to obey it. The Court of Appeals, therefore, on July 24, 1783, issued a writ of attachment for contempt against the captors.¹⁰⁸ It will be remembered that when Congress had debated the creation of the Court of Appeals, it had considered granting the Court contempt power but rejected the idea. The Court's authority to grant a writ of attachment thus could have been challenged. Only a theory of the inherent power of the Court to issue an attachment could justify the Court's action.

The final mention of the *San Antonio* occurred in another resolve of Congress of September 10, 1783. Rendon, the Spanish *chargé d'affaires* and Argote had written to Congress in August,¹⁰⁹ both again expressing indignation at the conduct of the captors and frustration at their inability to obtain compliance with the decree of the Court of Appeals. A committee of Congress reviewed the case and considered these two letters along with the earlier letter from the owners of the *Patty*. The committee con-

¹⁰⁶ PCC, Item 42, VII, at 165-68.

¹⁰⁷ Case file #104090, Court Files Suffolk; Suffolk Minute Book, February 1786 Term, Supreme Judicial Court of Massachusetts, Office of the Clerk. The action brought by Dumont was in trespass on the case.

¹⁰⁸ Attachment, in file of *San Antonio*, RCA #95. The controlling language of the writ states:

These are therefore in the Name and by the Authority of the United States of America to authorize and command you the s[ai]d _____ who for this purpose are hereby specially nominated and appointed to attach and apprehend them the s[ai]d Leonard Jarvis Joseph Russell and Isaac Sears [owners and agents of the *Patty*] by their Persons respectively so that you forthwith have their and each of their Bodies before us to answer us of the Trespass and Contempt aforesaid.

The copy of the writ in the RCA file leaves two blanks where the name of the person who is to execute the writ belonged. In the Papers of the Continental Congress, however, is an exact copy of the writ with the blanks filled in with the name of Thomas Ressel Esq. of Boston, Merchant. PCC, Item 78, XIX, at 453.

¹⁰⁹ PCC, Item 78, XIX, at 443, 446.

cluded that the Court of Appeals had exclusive power to issue a final decree in prize cases and that over the Court "Congress has no control but that of removing the Judges for corruption or misdemeanor." Based on this report, Congress recommended that the Governor of Massachusetts should "give such assistance as shall be found necessary to the due execution of the definitive decree of the Court of Appeals" in the case of the *San Antonio*.¹¹⁰ With this meek congressional plea for compliance, therefore, the case of the *San Antonio* vanished from the records. The records investigated give no indication whether the Spanish claimants recovered their property.

The main justification for discussing the case of the *San Antonio* has been to demonstrate how American lawyers used the writings on the law of nations in legal argument during the Revolutionary War period. The lawyers turned to these philosophical writers as legal sources in the way that they would have relied on reported prize cases, if such had been available.¹¹¹ The Court of Appeals clearly thought such reliance was appropriate, that the principles of the law of nations should be the rule of decision in prize cases.¹¹² The underlying natural law philosophy on which the law of nations was based struck a resonant chord with the American bench and bar. Incorporation of the law of nations, therefore, must have seemed so obvious to eighteenth century lawyers that there was no reason to question its propriety.

The attorneys, when representing a client, hardly thought it necessary to approach the various authorities on the law of nations critically. There are no indications that the lawyers were concerned that the different writers disagreed with each other in their philosophical approaches. A discerning, discriminating analysis of the writings on the law of nations was not what the lawyers sought. They apparently hunted through the sources for any passage which could help their client's case and inserted it at the appropriate place in the legal argument, unconcerned that the sources relied on might have argued from conflicting positions.¹¹³

¹¹⁰ 25 Ford, JCC 546-48.

¹¹¹ British prize decisions had not yet been reported and so were not accessible to American lawyers. But as soon as they were reported some fifteen years after the case of the *San Antonio*, American lawyers began relying on them in their arguments before the Supreme Court. *REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF ADMIRALTY* (C. Robinson ed., 6 vols., 1798-1808). As early as 1800 American attorneys were citing Robinson's Admiralty Reports. *The Eliza*, 4 Dallas 36 (1800); *The Amelia*, 1 Cranch 1 (1801); *The Charming Betsy*, 2 Cranch 64 (1804); *The Blaireau*, 2 Cranch 240 (1804).

¹¹² The Court of Appeals in 1781, in one of its few full opinions, quoted from Vattel, whom it called "a celebrated writer on the laws of Nations." *Resolution* (Miller v. Ingersoll) and (O'Brien v. Miller), 2 Dallas 1, 15, Aug. 15, 1781, RCA. It is possible to document the reliance of the Court of Appeals, as well as of state admiralty courts, on the authorities on the law of nations, in a number of other cases. See *BOURGUIGNON*, *supra* note 11, Chs. V, VIII. For a nearly contemporary example of similar reliance on the authorities on the law of nations in a state common law court, see 1 *LAW PRACTICE OF HAMILTON*, *supra* note 68, at 336-419.

¹¹³ For example, in the notes of the oral argument discussed above, James Wilson cited Rutherford, Grotius, Vattel, and Pufendorf on the question "To whom do navi-

Counsel for both parties cited the same authorities, showing a strong preference for Vattel. Wilson derived broader propositions from the various writers he cited and employed these basic principles to support his audacious policy argument. Morton and Lewis, on the other hand, looked for discussions in the writers which more immediately applied to the facts of this case. Through such arguments various principles of the law of nations became a part of the law of this country..

Finally, a few words about the Court of Appeals are appropriate. The case of the *San Antonio* glaringly exposed the inadequacy of this appellate prize system established by the Continental Congress. Other cases could be cited to show that the congressional appellate court could not exert more authority than Congress itself possessed.¹¹⁴ A small number of individuals, who soon would have enormous influence in establishing a more effective national judiciary, were thoroughly acquainted with the inherent feebleness of the Court of Appeals. Oliver Ellsworth, for instance, had been one of the judges on appeal in the case of the sloop *Active*. James Wilson had served as counsel in both the *Active* case and the case of the *San Antonio*. Both were influential at the 1787 Constitutional Convention in framing Article III, concerning the judiciary. Ellsworth was, as a Senator, largely responsible for the Judiciary Act of 1789. These leaders could not have failed to observe the likelihood of local jury prejudice against out-of-state and foreign parties.¹¹⁵ The *San Antonio* case also showed the intense feelings which could be aroused in foreign relations by a failure of the judicial machinery. Spain, presumably, could have understood an unfavorable decree by the trial court. But to have prevailed on appeal, to have convinced the Court of Appeals that the Massachusetts privateers had perpetrated an outrage against Spanish sovereignty, and then not to be able to obtain prompt compliance with the appellate decree—this would be hard for any foreign nation to tolerate. There can be little doubt that first-hand familiarity with the congressional appellate prize court influenced the men who were responsible for the creation of the federal judiciary under the Constitution.

gable Rivers belong." A thorough reading of these authors on the subject would have revealed some basic differences of opinion.

¹¹⁴ BOURGUIGNON, *supra* note 11, Ch. VII.

¹¹⁵ In the case of the *San Antonio*, the jury in Massachusetts included at least two jurors who had the closest possible ties with privateering interests in the State. Mungo Mackey, one of the jurors, was part owner of a privateer which was involved in an appeal to the congressional appellate prize court, *Brunette* (Williams v. Mackey), Sept. 21, 1783, RCA #79. John Bradford Jr., another juror, was apparently the son of the John Bradford who had an interest in other privateers, and who acted as agent for the Navy in bringing prize suits. *Charming Peggy* (Keppele v. Glover), May 24, 1784, RCA #3; *Nancy* (Babcock v. Bradford,) Aug. 9, 1779, RCA #47; *Viper* (Brimmer v. Bradford), Nov. 8, 1779, RCA #54; *LeVern* (de Valnais v. Tucker), July 25, 1780, RCA #56; *Sandwich Packet* (Bradford v. Brimmer), Aug. 14, 1780, RCA #66; *Mary* (Trivett v. Bradford), June 23, 1780, RCA #67.

EDITORIAL COMMENT

THE TWILIGHT EXISTENCE OF NONBINDING INTERNATIONAL AGREEMENTS

The adoption of the Final Act of the Helsinki Conference in 1975¹ and subsequent references to it as evidence of international commitments raise questions about the nature and effect of international agreements which are entered into by states but are not intended to be legally binding on the parties. In the case of the Helsinki Final Act, the Heads of State and other "High Representatives" of thirty-five countries signed the texts, covering sixty printed pages, after declaring in the last paragraph "their determination to act in accordance with the provisions contained in the above texts."² Another paragraph, among the final clauses, requests the Government of Finland to transmit to the Secretary-General of the United Nations the text of the Final Act "which is not eligible for registration under Article 102 of the Charter of the United Nations."³ This clause was further clarified by a letter sent by the Government of Finland to the Secretary-General of the United Nations (which was based on drafts negotiated by the major governments) stating that the Final Act is not eligible for registration under Article 102 "as would be the case were it a matter of a treaty or an international agreement, under the aforesaid Article."⁴ Statements by delegates during the Conference, notably by the United States and other Western delegations, expressed their understanding that the Final Act did not involve a "legal" commitment and was not intended to be binding upon the signatory Powers. Harold Russell, the leading member of the American delegation, observed that considerable importance was attached to that point by the United States.⁵ There does not appear to be any evidence that the other signatory states disagreed with this understanding.

International lawyers generally agree that an international agreement is not legally binding unless the parties intend it to be. Put more formally, a treaty or international agreement is said to require an intention by the parties to create legal rights and obligations or to establish relations governed by international law.⁶ If that intention does not exist, an agreement

¹ The full name is the Final Act of the Conference on Security and Cooperation in Europe. The text of the document signed in Helsinki on August 1, 1975 is reproduced in 14 ILM 1293 (1975) and in 73 DEPT. STATE BULL. 323 (1975).

² 14 ILM 1325 (1975).

³ *Id.*

⁴ Russell, *The Helsinki Declaration: Brobdingnag or Lilliput*, 70 AJIL 242, 247, 248 (1976).

⁵ *Id.* at 246.

⁶ 1 D. P. O'CONNELL, *INTERNATIONAL LAW* 195 (2nd ed. 1970); A. McNAIR, *LAW OF TREATIES* 6 (1961).

is considered to be without legal effect ("sans portée juridique").⁷ States are, of course, free to enter into such nonbinding agreements, whatever the subject matter of the agreement. However, questions have often arisen as to the intention of the parties in this regard. The main reason for this is that governments tend to be reluctant (as in the case of the Helsinki Final Act) to state explicitly in an agreement that it is nonbinding or lacks legal force.⁸ Consequently inferences as to such intent have to be drawn from the language of the instrument and the attendant circumstances of its conclusion and adoption. Emphasis is often placed on the lack of precision and generality of the terms of the agreement. Statements of general aims and broad declarations of principles are considered too indefinite to create enforceable obligations and therefore agreements which do not go beyond that should be presumed to be nonbinding.⁹ It is also said, not implausibly, that mere statements of intention or of common purposes are grounds for concluding that a legally binding agreement was not intended. Experience has shown that these criteria are not easy to apply especially in situations where the parties wish to convey that their declarations and undertakings are to be taken seriously, even if stated in somewhat general or "programmatic" language. Thus, conflicting inferences were drawn as to the intent of the parties in regard to some of the well-known political agreements during the Second World War, notably the Cairo, Yalta, and Potsdam agreements.¹⁰ No doubt there was a calculated ambiguity about the

⁷ International Status of South-West Africa, Advisory Opinion [1950] ICJ REP. 128 at 140. For a similar view expressed recently by the Legal Adviser of the State Department in connection with the Case Act, see *infra* note 22.

⁸ See Münch, *Non-Binding Agreements* 29 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 at 3 (1969). During the Helsinki Conference, the USSR, Switzerland, and Romania objected to including an explicit statement in the text that the Final Act was not a treaty or international agreement susceptible of registration under Article 102. See Russell, *supra* note 4, at 247.

⁹ O'CONNELL, *supra* note 6, at 199-200. But other jurists have noted that vague and ill-defined provisions appear in agreements which do not lose their binding character because of such indefiniteness. See P. REUTER, INTRODUCTION AU DROIT DES TRAITÉS 44 (1972); G. G. Fitzmaurice, Report on the Law of Treaties to the International Law Commission. [1956] 2 Y.B. INT. LAW COMM. 117, UN Doc. A/CN.4/101 (1956). The latter commented that "it seems difficult to refuse the designation of treaty to an instrument—such as, for instance, a treaty of peace and amity, or of alliance—even if it only establishes a bare relationship and leaves the consequences to rest on the basis of an implication as to the rights and obligations involved, without these being expressed in any definite articles." *Id.*

¹⁰ Statements by officials of the British and U.S. Governments indicated that they did not consider the Yalta and Potsdam agreements as binding. For the U.K. views, see references in Münch, *supra* note 8, at 5 n. 22. For the U.S. position, see *infra* note 11. A contrary point of view was expressed in 1969 by a representative of the USSR at the Vienna Conference on the Law of Treaties. He declared that the Yalta and Potsdam agreements as well as the Atlantic Charter provided for "rights and obligations" and laid down "very important rules of international law." UN Doc. A/Conf.39/11 Add. 1, at 226 (para. 22). Sir Hersch Lauterpacht considered that the Yalta and Potsdam agreements "incorporated definite rules of conduct which may be regarded as legally binding on the States in question." 1 OPPENHEIM, INTERNATIONAL LAW 788 (7th ed.

obligatory force of these instruments at least in regard to some of their provisions and this was reflected in the way the governments dealt with them.¹¹ After all, imprecision and generalities are not unknown in treaties of unquestioned legal force. If one were to apply strict requirements of definiteness and specificity to all treaties, many of them would have all or most of their provisions considered as without legal effect. Examples of such treaties may be found particularly among agreements for cultural cooperation and often in agreements of friendship and trade which express common aims and intentions in broad language. Yet there is no doubt that they are regarded as binding treaties by the parties and that they furnish authoritative guidance to the administrative officials charged with implementation. Other examples of highly general formulas can be found in the UN Charter and similar "constitutional" instruments the abstract principles of which have been given determinate meaning by the international organs (as, for example, has been done in regard to Articles 55 and 56 of the Charter).¹² These cases indicate that caution is required in drawing inferences of nonbinding intention from general and imprecise undertakings in agreements which are otherwise treated as binding. However, if the text or circumstances leave the intention uncertain, it is reasonable to consider vague language and mere declarations of purpose as indicative of an intention to avoid legal effect.¹³ Other indications may be found in the way the instrument is dealt with after its conclusion—for example, whether it is listed or published in national treaty collections, whether it is registered under Article 102 of the Charter, whether it is described as a treaty or international agreement of a legal character in submissions to national parliaments or courts.¹⁴ None of these acts can be considered as decisive evidence but together with the language of

H. Lauterpacht, ed. 1948). On the other hand, Professor Briggs suggested that the Yalta agreement on the Far Eastern territories may be considered only as "the personal agreement of the three leaders." Briggs, *The Leaders' Agreement of Yalta*, 40 AJIL 376, at 382 (1946).

¹¹ The Yalta Agreement was published by the State Department in the Executive Agreements Series (No. 498) and was also published in U.S. Treaties in Force (1963). However, in 1956 the State Department stated to the Japanese Government in an aide-mémoire that "the United States regards the so-called Yalta Agreement as simply a statement of common purposes by the heads of the participating governments and . . . not as of any legal effect in transferring territories." 35 DEPT. STATE BULL. 484 (1956). But see Briggs, *supra* note 10, for statements by the U.S. Secretary of State that an agreement was concluded by the leaders.

¹² See memorandum of State Department quoted *infra* note 24. See also L. SOHN AND T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 505-14, 946-47 (1973).

¹³ See Münch, *supra* note 8, at 8; O'CONNELL, *supra* note 6, at 199. But cf. REUTER and FITZMAURICE, *supra* note 9.

¹⁴ The appellation of an instrument has but little evidentiary value as to its legal effect in view of the wide variety of terms used to designate binding treaties and the accepted rule that form and designation are immaterial in determining their binding effect. Thirty-nine different appellations for treaties are listed in Myers, *The Names and Scope of Treaties*, 51 AJIL 574 (1957).



the instruments they are relevant. The level and authority of the governmental representatives who have signed or otherwise approved the agreement may also be relevant but here, too, some caution is necessary in weighing the evidentiary value. Chiefs of state and foreign ministers do enter into nonbinding arrangements and lower officials may, if authorized, act for a state in incurring legally binding obligations. If a lower official, without authority, purports to conclude an agreement, the supposed agreement may be entirely void and without any effect. It would, in consequence, have to be distinguished from the kind of nonbinding agreement which is treated by the parties as an authorized and legitimate mutual engagement.

We should bear in mind that not all nonbinding agreements are general and indefinite. Governments may enter into precise and definite engagements as to future conduct with a clear understanding shared by the parties that the agreements are not legally binding. The so-called "gentlemen's agreements" fall into this category. They may be made by heads of state or governments or by ministers of foreign affairs and, if authorized, by other officials. In these cases the parties assume a commitment to perform certain acts or refrain from them. The nature of the commitment is regarded as "nonlegal" and not binding. There is nonetheless an expectation of, and reliance on, compliance by the parties. An example is the agreement made in 1908 by the United States and Japan, through their foreign ministers, relating to immigration which was observed for nearly two decades, although probably not considered binding.¹⁵ On the multilateral level, some gentlemen's agreements have been made by governments with regard to their activities in international organizations, particularly on voting for members of representative bodies which have to reflect an appropriate distribution of seats among various groups of states (as for instance, the London agreement of 1946 on the distribution of seats in the Security Council).¹⁶ It has been suggested that a gentlemen's agreement is not binding on the states because it is deemed to have been

¹⁵ In this gentlemen's agreement, the Japanese Government agreed to take administrative measures to check the emigration of Japanese laborers to the United States on the understanding that the United States would not adopt discriminatory exclusionary legislation against Japanese, "stigmatizing them as unworthy." [1924] 2 FOREIGN RELATIONS OF THE UNITED STATES 339-74. The agreement came to an end when Congress enacted the 1924 immigration law which did discriminate against Japanese. *Id.* at 374-93.

¹⁶ The 1946 London agreement was described in the General Assembly as "an oral agreement . . . known as a gentlemen's agreement, because it was an agreement by word of honour and was not recorded in any document" . . . "whereby the seats were to be distributed among the non-permanent members of the Security Council in accordance with a fixed plan." 2 REPERTORY OF UNITED NATIONS PRACTICE 8 para. 16 (1955). Reference to the gentlemen's agreement on the distribution of seats in the International Law Commission was made recently in the UN General Assembly in connection with the election of members of the Commission on November 17, 1976. See UN Doc. A/31/PV.68 at 7, 11. For earlier references to the gentlemen's agreement on distribution of I.L.C. seats, see H. BRIGGS, THE INTERNATIONAL LAW COMMISSION 33-42 (1965).

concluded by the representatives in their personal names and not in the name of their governments.¹⁷ This reasoning is rather strained in the case of agreements which are intended to apply to government action irrespective of the individual who originally represented the government. It seems more satisfactory to take the position, in keeping with well-established practice, simply that it is legitimate for governments to enter into gentlemen's agreements recognizing that they are without legal effect.

This still leaves us with questions as to the nature of the commitment accepted by the parties in a nonbinding agreement and what precisely is meant by stating that the agreement is without legal effect. We shall begin with the latter point.

It would probably be generally agreed that a nonbinding agreement, however seriously taken by the parties, does not engage their legal responsibility. What this means simply is that noncompliance by a party would not be a ground for a claim for reparation or for judicial remedies. This point, it should be noted, is quite different from stating that the agreement need not be observed or that the parties are free to act as if there were no such agreement. As we shall indicate below, it is possible and reasonable to conclude that states may regard a nonbinding undertaking as controlling even though they reject legal responsibility and sanctions. The conclusion that a nonbinding agreement does not give rise to legal responsibility is not an analytical proposition (*i.e.*, it does not simply follow from the definition of a nonbinding agreement). It is an empirical conclusion based on state practice. In the absence of such practice one could take the position that a nonbinding international agreement should be treated in the same way as a contract terminable at the will of either party and, on that basis, conclude that a breach prior to such termination would give rise to legal responsibility for reparation. However, this theoretical position finds no support in the practice of states or in their expressed attitudes. There have been more than a few nonbinding agreements, yet there has been no indication that the parties have treated nonperformance as a ground for reparations or legal sanctions.

A second proposition that would command general (though not unanimous) agreement is that nonbinding agreements are not "governed by international law." Exclusion from the Vienna Convention on the Law of Treaties follows from the conclusion that such agreements are not governed by international law, a requirement laid down in the definition in Article 2(a). A paradox may be seen in this reasoning. For when it is said that nonbinding agreements are not governed by international law, that assertion must itself be a rule of international law, ergo the first assertion cannot be true but if not true then the second is false and therefore not applicable. This is similar to classical paradoxical statements like "all generalizations are false" (or "I am lying") which if true are false. The logical solution is to recognize that the two propositions (*i.e.*, "The agreements are not governed by international law" and "the foregoing is a

¹⁷ The suggestion was made by REUTER, *supra* note 9, at 44.

rule of international law") are of different hierarchical order and therefore the second cannot contradict the first.¹⁸ Apart from that nice point of logic, there is still the question why nonbinding agreements are not governed by international law. I suggest the answer is that, since nonbinding agreements are by definition outside the basic rule of *pacta sunt servanda*, they cannot be within the customary law of treaties based on *pacta sunt servanda*. This might seem tautologous but it is not if we recognize that the latter proposition about the scope of customary law is not definitional but empirical (*i.e.*, based on state practice). It might be noted, parenthetically, that the travaux préparatoires of the Vienna Convention on the Law of Treaties confirm the conclusion that nonbinding agreements were intended to be excluded from the Convention on the ground that they are not governed by international law.¹⁹

The conclusion that nonbinding agreements are not governed by international law does not however remove them entirely from having legal implications. Consider the following situations. Let us suppose governments in conformity with a nonbinding agreement follow a course of conduct which results in a new situation. Would a government party to the agreement be precluded from challenging the legality of the course of conduct or the validity of the situation created by it? A concrete case could arise if a government which was a party to a gentlemen's agreement on the distribution of seats in an international body sought to challenge the validity of the election. In a case of this kind, the competent organ might reasonably conclude that the challenging government was subject to estoppel in view of the gentlemen's agreement and the reliance of the parties on that agreement.²⁰

¹⁸ In logic, this principle is known as the theory of types. See BERTRAND RUSSELL, *AN INQUIRY INTO MEANING AND TRUTH* 75-76 (1940).

¹⁹ At the Vienna conference a Swiss amendment was proposed to exclude nonbinding agreements such as "political declarations and gentlemen's agreements." In the opinion of the Swiss legal adviser (Bindschedler), such nonbinding agreements were governed by international law and had legal consequences and therefore would not be excluded by the definition in Article 2. The amendment was not adopted presumably because most representatives thought that such nonbinding agreements were not governed by international law. Taking a different position, the USSR representative opposed the Swiss amendment because he considered that some of the agreements referred to by the Swiss delegate should be covered by the Vienna Convention (mentioning the Atlantic Charter, Yalta, and Potsdam agreements). See *supra* note 10. As indicated by its preparatory work, the International Law Commission intended to exclude the nonbinding agreements from the scope of the Vienna Convention and thought this would be done by the definition of international agreements as those governed by international law. See Report of the International Law Commission to the General Assembly [1959] 2 Y.B. INT. LAW COMM. 96-97, UN Doc. A/4169 (1959). For earlier references, see Brierly, Report [1950] *id.* 228, UN Doc. A/CN.4/23 (1950); Lauterpacht, Report [1953] *id.* 96-99, UN Doc. A/CN.4/63 (1953).

²⁰ Münch also suggests the principle of estoppel, *supra* note 8, at 11. On estoppel in international practice, see I. C. MacGibbon, *Estoppel in International Law* 7 INT. COMP. L.Q. 468 (1958); A. P. Rubin, *The International Legal Effects of Unilateral Declarations* 71 AJIL 1 (1977).

Another aspect relates to the meaning of "international agreements" for purposes of national law requirements such as submission for parliamentary approval or information. For example, in the United States the Case Act of 1972 requires the Secretary of State to transmit to the Congress all international agreements other than treaties no later than sixty days after their entry into force.²¹ The criteria employed by the State Department in deciding what constitutes an international agreement for this purpose have included "as a central requirement" that the parties intend their undertaking to be of legal, and not merely political or personal, effect.²² "Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements."²³ Another criterion of the State Department is that the agreements have a "certain precision and specificity setting forth the legally binding undertakings."²⁴ These criteria are the same as the international law standards generally accepted for determining the binding force of agreements. Presumably they are also consistent with the congressional intent in regard to the reporting requirements. But the Congress might have adopted a less exacting interpretation and required reports of agreements intended to have "political or moral weight," even if legally nonbinding. It would not be unreasonable to do so in the light of the significance accorded to such agreements in international relations.²⁵ There is no constitutional reason why the Congress could not require reports on political or moral commitments irrespective of whether they constitute legal obligations.

Still another kind of legal question may arise in regard to nonbinding agreements. What principles or rules are applicable to issues of interpretation and application of such agreements? As we have already seen, customary law and the Vienna Convention do not "govern" the agreements. But if the parties (or even a third party such as an international organ) seek authoritative guidance on such issues, it would be convenient and reasonable to have recourse to rules and standards generally applicable to treaties and international agreements insofar as their applicability is not at variance with the nonbinding nature of these agreements. For example,

²¹ Pub. Law 92-403, 1 U.S.C. 112(b) (1972).

²² Memorandum by the State Department Legal Adviser to "Key Department Personnel" dated March 12, 1976 on "Case Act Procedures and Department of State Criteria for Deciding What Constitutes an International Agreement." (The memorandum was unclassified and transmitted to other government agencies.)

²³ *Id.* at 3.

²⁴ *Id.* at 4. The memorandum states "For example, a promise 'to help develop a more stable world economic system' lacks the specificity essential to constitute a legally binding international agreement. At the same time, undertakings as general as those of Articles 55 and 56 of the U.N. Charter have been held to create internationally binding agreements (though not self-executing ones)."

²⁵ A pertinent example would be the "absolute assurances" given by President Nixon in letters to President Thieu of South Vietnam that the United States would take "swift and severe retaliatory action" if Hanoi failed to abide by the terms of the Paris Agreement and that in the event of violations the United States would "respond with full force." New York Times, May 1, 1975, at 16.

questions as to territorial scope, nonretroactivity, application of successive agreements, or criteria for interpretation could be appropriately dealt with by reference to the Vienna Convention even though that Convention does not in terms govern the agreements.

Our comments thus far have been made on the assumption that the nonbinding agreements under consideration contain undertakings taken seriously by the states parties to them. We are not concerned with those agreements which have been made by persons lacking authority or which are no more than propaganda, or which are immediately treated as "scraps of paper." The examples referred to have been agreements which the parties intend to observe and which they consider impose restraints on their freedom to act as if the agreements did not exist.²⁶ Since the agreements are, by hypothesis, legally nonbinding, they are generally referred to as political or moral commitments or some variant of that. What is meant by a political or moral commitment is rarely spelled out beyond the negative implication that it does not entail legal effect or sanctions. When the International Court of Justice was faced with an issue of this kind, it said, understandably, that it was not for the Court to "pronounce on the political or moral duties" which flow from such agreements.²⁷ International lawyers have, on the whole, taken a similar attitude. At times one can detect an element of condescension in their summary references to undertakings which are "merely" political or moral. The question whether such commitments are generally observed is, of course, a question for empirical research and not for normative analysis. It may be useful, however, to indicate what may reasonably be meant by an understanding that an agreement entails a political or moral obligation and what expectations are created by that understanding.

Two aspects may be noted. One is internal in the sense that the commitment of the state is "internalized" as an instruction to its officials to act accordingly. Thus, when a government has entered into a gentlemen's agreement on voting in the United Nations, it is expected that its officials will cast their ballots in conformity with the agreement though no legal sanction is applicable. Or when governments have agreed, as in the Helsinki Act, on economic cooperation or human rights, the understanding and expectation is that national practices will be modified, if necessary, to conform to those understandings. The political commitment implies, and should give rise to, an internal legislative or administrative response. These are often specific and determinate acts.

²⁶ Secretary of State Kissinger in testimony to the Senate Foreign Relations Committee on the United States undertakings in connection with the Sinai Disengagement Agreements of 1975 noted that certain of the undertakings were "not binding commitments of the United States" but he went on to say that that "does not mean, of course, that the United States is morally or politically free to act as if they did not exist. On the contrary, they are important statements of diplomatic policy and engage the good faith of the United States as long as the circumstances that gave rise to them continue." 73 DEPT. STATE BULL. 613 (1975).

²⁷ ICJ REP., *supra* note 7, at 139.

The second aspect is "external" in the sense that it refers to the reaction of a party to the conduct of another party. The fact that the states have entered into mutual engagements confers an entitlement on each party to make representations to the others on the execution of those engagements. It becomes immaterial whether the conduct in question was previously regarded as entirely discretionary or within the reserved domain of domestic jurisdiction. By entering into an international pact with other states, a party may be presumed to have agreed that the matters covered are no longer exclusively within its concern. When other parties make representations or offer criticism about conduct at variance with the undertakings in the agreement, the idea of a commitment is reinforced, even if it is labelled as political or moral. We must, however, recognize that noncompliance may be so substantial and widespread as to bring into question whether the agreement is still operative. Just as the parties may terminate an agreement expressly, they may do so by not observing its terms in a manner or on a scale sufficient to confirm their rejection of the agreement. This does not mean, of course, that any violation of the requirements of the agreement would signify its termination. There may still be expectations of continued observance by the parties.

The fact that nonbinding agreements may be terminated more easily than binding treaties should not obscure the role of the agreements which remain operative. De Gaulle is reported to have remarked at the signing of an important agreement between France and Germany that international agreements "are like roses and young girls; they last while they last."²⁸ As long as they do last, even nonbinding agreements can be authoritative and controlling for the parties. There is no *a priori* reason to assume that the undertakings are illusory because they are not legal. To minimize their value would exemplify the old adage that "the best is the enemy of the good." It would seem wiser to recognize that nonbinding agreements may be attainable when binding treaties are not and to seek to reinforce their moral and political commitments when they serve ends we value.²⁹

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²⁸ De Gaulle's remark was quoted in a lecture by Dr. Shabtai Rosenne at the 27th Congress of the Association of Alumni of the Hague Academy of International Law in 1975. The source cited by Dr. Rosenne was a letter in *THE ECONOMIST* (London), March 18, 1972, at 6.

²⁹ Illustrative of such efforts are the official and nonofficial activities in several countries to monitor and comment on the implementation of the Helsinki Final Act, especially in regard to the "Third Basket" or human rights provisions. There are indications that these efforts have been a factor in producing changes in the national policy of some signatories to conform to the engagements of the Final Act. A conference of signatories is to be held in Belgrade in 1977 on the implementation of the Helsinki accord.

NOTES AND COMMENTS

LAW OF THE SEA: THE SCOPE OF THE THIRD-PARTY, COMPULSORY PROCEDURES FOR SETTLEMENT OF DISPUTES

Section II of Part IV of the Revised Single Negotiating Text (RSNT)¹ prepared by the President² of the Conference on the Law of the Sea following the 1976 Summer Session of the Conference in New York, contains the compulsory procedure for the settlement of disputes under the Law of the Sea Convention. Article 17 of that Section, which is the subject of this analysis, reads in part as follows:

1. Disputes relating to the exercise by a coastal State of *sovereign rights, exclusive rights* or *exclusive jurisdiction* recognized by the present Convention shall be subject to the procedure specified in Section II only in the following cases: (Emphasis added)

(a) when it is claimed that a coastal State has acted in contravention of the provisions of the present Convention in regard to the freedom of navigation or overflight or of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation or communication; or

(b) when it is claimed that any State in exercising the aforementioned freedoms has acted in contravention of the provisions of the present Convention or of laws or regulations enacted by the coastal State in conformity with the present Convention and other rules of international law not incompatible with the present Convention; or

(c) when it is claimed that a coastal State has acted in contravention of specified international standards or criteria for the preservation of the marine environment or for the conduct of marine scientific research, which have been established by the present Convention or by a competent international authority acting in accordance with the present Convention; or

(d) when it is claimed that a coastal State has manifestly failed to comply with specified conditions established by the present Convention relating to the exercise of its rights or performance of its

¹ UN Doc. A/CONF.62/Rev.2, Part IV, Nov. 23, 1976 (hereinafter cited as RSNT, Part IV).

² As distinguished from Parts I, II, and III which were prepared by the Chairman of each of the Main Committees of the Law of the Sea Conference, Part IV on Settlement of Disputes was produced by the President of the Conference. Parts I, II, and III of the RSNT appear as UN Doc. A/CONF.62/WP.8/Rev.1, May 6, 1976. This document, as well as an earlier version of Part IV (UN Doc. A/CONF.62/WP.9/Rev.1, May 6, 1976) can be found in 5 THIRD UN CONFERENCE ON THE LAW OF THE SEA, OFF. REC., Fourth Session, New York, 15 March-7 May 1976 (hereinafter cited as 5 LOS OFF. REC.). See also 15 ILM 61 (1976). For further discussion on the RSNT, see B. H. Oxman, *The Third United Nations Conference on the Law of the Sea: the 1976 New York Sessions* in this issue of the *Journal*, *supra* p. 247.

duties in respect of living resources provided that in no case shall the sovereign rights of the coastal State be called in question.³

The emphasized terms in the *chapeau* of the above text describe the extent of the rights of coastal states to exclude matters from dispute settlement procedures. With respect to each category of the coastal state's competence as further defined below, the coastal state exercises the right of excluding certain matters from the compulsory procedures contained in Section II of Part IV, except for the cases specifically mentioned in subparagraphs (a) through (d) of the first paragraph of Article 17 as set out above. As these specifically enumerated cases may be excluded from compulsory procedure by special declarations under Article 18,⁴ these two articles together define the scope of the applicability of Section II of Part IV.

It is not, however, easy to ascertain the actual scope of the compulsory procedures as stipulated in Article 17 without taking full account of the relevant substantive provisions of the other Parts of the RSNT. This note, which is intended to throw some light on the limitations on the compulsory procedures, will attempt to provide a working definition of the crucial terms used in the *chapeau* of the above Article 17 and to demonstrate that Part IV has been drafted in such a way as to take into account the substantive provisions of the other Parts of the Convention. It is believed that the establishment of the meaning of the crucial terms being used in the Law of the Sea Convention and their correct application in

³This subject of exclusions to third-party settlement procedures was treated in Article 18 of the earlier version of the text (see UN Doc. A/CONF.62/WP.9/Rev.1, *supra* note 2). The numbering of the articles in the "Rev.2" version has been changed and the subject is now treated under Article 17 because draft Article 14 on the rule of exhaustion of local remedies, contained in the "Rev.1" version, has now been dropped. The abandonment of the local remedies rule does not, however, mean that the rule would not apply in appropriate cases. It is the view of this writer that the requirement of exhaustion of local remedies as a precondition for international proceedings would still apply, as a customary rule of international law, in the relevant circumstances under the Convention, even if the Convention chooses to remain silent about it.

⁴There are also optional exceptions which a state may make by declaration as provided for under Article 18 as follows:

1. A Contracting Party when ratifying or otherwise expressing its consent to be bound by the present Convention, or at any time thereafter, may declare that it does not accept any one or more of the procedures for the settlement of disputes specified in Section II with respect to one or more of the following categories of disputes:

(a) disputes concerning sea boundary delimitations between adjacent or opposite States, or those involving historic bays or titles, provided that the State making such a declaration shall indicate therein a regional or other third party procedure, entailing a binding decision, which it accepts for the settlement of such disputes;

(b) disputes concerning military activities, including those by government vessels and aircraft engaged in non-commercial service, provided that law enforcement activities pursuant to the present Convention shall not be considered military activities;

(c) disputes in respect of which the Security Council of the United Nations, while exercising the functions assigned to it by the Charter of the United Nations, determines that specified proceedings under the present Convention interfere with the exercise of such functions in a particular case.

the various Parts of the Convention will greatly assist negotiators on this important aspect of the Law of the Sea Convention.

The texts of the pertinent substantive provisions of the RSNT have used the following terms in relation to the description of the nature of coastal state competence both in the territorial sea and the economic zone: (1) sovereignty; (2) sovereign rights; (3) exclusive rights; (4) exclusive jurisdiction; and (5) jurisdiction.

(1) The term *sovereignty* is used in the Convention to denote the usual broad and complete powers of a coastal state which are exercised over its territorial sea as provided for in Article 1 of Part II of the RSNT. Disputes arising from the conduct of states in their territorial sea are assumed to be unquestionably within the competence of domestic courts, as in the case of those arising in the land territory of a state. Thus no specific exclusion was required under paragraph 1 of Article 17 with respect to such disputes.⁵

(2) The term *sovereign rights* is used in the Convention to denote a restriction on the coastal state's competence to those powers which are specifically related to the exploitation and management of resources in general. Thus, paragraph 1(a) of Article 44 on the Exclusive Economic Zone in which a coastal state is expected to exercise less than complete sovereignty reads:

1. In an area beyond and adjacent to its territorial sea, described as the exclusive economic zone, the coastal State has:

(a) *Sovereign rights* for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living of the bed and subsoil and the superjacent waters;⁶ (Emphasis added)

Similarly, Article 65 of Part II of the RSNT concerning the continental shelf limits the coastal state's competence to those of exploitation of resources and reads:

The Coastal State exercises over the continental shelf *sovereign rights* for the purpose of exploring it and exploiting its natural resources.⁷ (Emphasis added)

Thus, disputes arising from the coastal state's exercise of the right of exploitation and management of the natural resources both in the exclusive economic zone and the continental shelf would generally be excluded from the third-party settlement procedures under Part IV of the RSNT, but some of them (mainly those related to living resources) are made subject to such proceedings under the conditions explained in sub-paragraph 1(d) of Article 17.

(3) The term *exclusive rights* is used in the Convention to denote the rights reserved to the coastal states, within the exclusive economic zone, related specifically to the establishment and use of artificial islands, installa-

⁵ Cf. the exceptions under Article 18(1)(a), *supra* note 4.

⁶ See UN Doc. A/CONF.62/WP.8/Rev.1, Part II, in 5 LOS OFF. REC., *supra* note 2, at 160.

⁷ *Id.* 164.

tions, and structures as provided for in paragraph 1(b) of Article 44 of Part II of the RSNT.⁸ Thus, when a coastal state exercises its rights on these matters, as elaborated under Article 48 of Part II of the RSNT,⁹ it would be entitled to exclude disputes arising from the exercise of such rights except in cases stipulated under Article 17.

(4) The term *exclusive jurisdiction* is used in the Convention to describe the rights of coastal states, within the exclusive economic zone, to enact and enforce customs, fiscal, health, safety, and immigration regulations with regard to artificial islands, installations, and structures, in accordance with paragraph 2 of Article 48 of Part II of the RSNT; to regulate nonresource related economic activities for the economic exploration and exploitation of the zone; and, subject to the relevant provisions of Part III of the RSNT, to deal with scientific research in the zone.

In the words of paragraph 1(c) of Article 44, the coastal state has within the economic zone:

Exclusive jurisdiction with regard to:

- (i) other activities for the economic exploitation and exploration of the zone, such as the production of energy from water, current and winds; and
- (ii) scientific research.¹⁰ (Emphasis added)

Disputes arising from the coastal state's legislation and enforcement thereof with respect to the above activities in the exclusive economic zone are, accordingly, excluded from the third-party settlement procedures unless the exceptions to the exclusions apply.

5) The term *jurisdiction*—ordinary and unqualified—is used in Part II of the Convention to denote the extent of coastal state's rights within the exclusive economic zone with regard to the preservation of the marine environment. Thus, paragraph 1(d) of Article 44 provides that the coastal state has, within the exclusive economic zone, "jurisdiction with regard to the preservation of the marine environment, including pollution control and abatement."

It may be noted that the extent to which coastal state activities may be subject to compulsory third-party proceedings would correspond somewhat to the nature and the extent of the coastal state's competence as defined above. There is, comparatively, more scope for third-party settlement proceedings with respect to issues over which the coastal state only exercises "jurisdiction"; less scope for third-party settlement procedures on issues over which a coastal state exercises "exclusive jurisdiction"; and even less scope for compulsory procedures as issues become those over which a coastal state exercises "exclusive rights" or "sovereign rights."

Despite the distinctions made between the extent of the coastal states competence as defined by the above terms, it remains difficult to classify all issues in neat categories for the purposes of third-party settlement.

⁸ *Id.* 160.

⁹ *Id.* 161.

¹⁰ *Id.* 160.

Article 17 of Part IV has, accordingly, attempted to work toward a reasonable compromise over the treatment of issues, having regard to the nature of coastal state powers. As can be seen, paragraph 1(c) of the present Article 17 clearly envisages international proceedings against a coastal state for contravening specific international standards and criteria established under the Convention, relating to (i) the preservation of the marine environment and (ii) the conduct of marine scientific research.¹¹ Paragraph 1(d) of the same Article 17 then provides for possible international proceedings against a coastal state for failure to comply with specific conditions established in the Convention¹² with regard to the management of the living resources provided that, in this respect, sovereign rights of the coastal state are not to be called into question.

Sub-paragraphs 1(c) and 1(d) of Article 17 of Part IV thus make a distinction on the following lines. They distinguish the scope of third-party settlement procedures in the context of coastal states' rights in the exclusive economic zone with respect to matters related to the exploration and exploitation of living resources on the one hand and those related to the preservation of the marine environment and the conduct of marine scientific research on the other. With respect to the former, international proceedings are envisaged but the sovereign rights of a coastal state are not to be questioned. With respect to the latter, international proceedings are envisaged even to the extent of calling in question sovereign rights. In its own way, Article 17 thus recognizes the hierarchy of coastal state powers as defined in the terms discussed herein. The broader categorization used in Article 17 seems more workable than attempting to distinguish each activity strictly in accordance with the nature of the state powers actually

¹¹ Under Article 44 paragraph 1(c) of Part II, scientific research is an activity over which a coastal state exercises "exclusive jurisdiction," together with the other activities for economic exploitation and exploration mentioned in that sub-paragraph. The extent of coastal state power over scientific research is accordingly different from that over the preservation of the marine environment with respect to which a coastal state only exercises "jurisdiction." A question may rightly be asked why Part IV, nevertheless, puts both scientific research and the preservation of the marine environment in the same category by making state conduct regarding them subject to compulsory procedures. This treatment may be seen as obliterating the deliberate distinction made between the extent of coastal state powers over scientific research (exclusive jurisdiction) and over preservation of the marine environment (jurisdiction).

The answer to this question seems to lie in the fact that Part III of the Convention which includes the substantive articles on the preservation of the marine environment and scientific research contains express provisions (Articles 76-77) for conciliation of disputes arising from the conduct of scientific research and for the settlement in accordance with Part IV of disputes not resolved by conciliation. Thus, the present Part IV has made the choice of treating the contravention of the international rules regarding scientific research in accordance with Part III, rather than the scheme of Part II under Article 44. Providing for third-party settlement procedures for cases involving preservation of the marine environment is, however, consistent not only with the scheme of Part II, Article 44 itself but also with Part III, which by Article 46, applies the settlement system in Part IV to such matters.

¹² See Articles 50 through 57 of Part II, *supra* note 2, at 161-63.

defined. To do so, one would, for example, have to provide for a different scope for Section II of Part IV with respect to the marine environment, scientific research, living resources and so on, in the economic zone. What is of paramount importance is that, whatever system is finally agreed upon, the dispute settlement procedures must not be used as a vehicle for turning the exclusive economic zone either into high seas or a territorial sea.

One must also look at the pertinent limitation imposed by Article 8 of Part IV on the application of Section II. Article 8 stipulates that, where another Part of the Convention has already provided for compulsory procedures for the settlement of a specific category of disputes, Section II shall not apply to such disputes.¹³ The same article, however, lays down the conditions under which Section II may nevertheless apply with respect to any category of disputes for the settlement of which another part of the Convention has provided only *nonbinding* procedures.¹⁴

Part IV must, accordingly, be closely linked with the substantive provisions of the other Parts of the Convention, including the provisions of those Parts relating to the settlement of disputes. For example, Article 15 of Annex II of the present Part IV, incorporating the draft statute of the proposed Law of the Sea Tribunal, provides for a Sea-Bed Disputes Chamber.¹⁵ This raises an important question since Part I itself already has elaborate provisions on the settlement of disputes including a draft statute of the Sea-Bed Settlement system. Thus Annex II of Part IV, in providing for a Sea-Bed Dispute Chamber, emphasizes the obvious fact that all the provisions on dispute settlement in the seabed area must be resolved along with the other substantive issues before Committee I of the Conference. In its present form, Article 15 of the statute of the Law of the Sea Tribunal, at best, represents an aspect of the continuing efforts to find a composite system for settling disputes under the Law of the Sea Convention as a whole. The article merely maintains the options open for this approach and should not stand in the way of the discussions in Committee I concerning settlement of disputes in the seabed area.

The scope of the third-party compulsory procedures for dispute settlement must be considered in the actual choices of fora open for parties for initiating such procedures. Article 9 offers choices of such fora and seeks

¹³ RSNT, Part IV, Art. 8, *supra* note 1.

¹⁴ *Id.* Art. 8(2).

Article 15

¹⁵ 1. A Sea-Bed Disputes Chamber of the Tribunal shall be established, for dealing with disputes relating to the interpretation or application of the provisions of Part I of the present Convention, or of any rules or regulations enacted thereunder, or of any contract, agreement or arrangement concluded pursuant to, or related to the purposes of, that Part.

2. The Sea-Bed Disputes Chamber shall be composed of 11 members, selected from among members of the Tribunal in such manner as shall be provided in Part I of the present Convention.

3. Notwithstanding any provisions of this Statute to the contrary, the jurisdiction, powers and functions of, and access to, the Sea-Bed Disputes Chamber shall be governed by the provisions of Part I of the present Convention. *Id.* 23.

to ensure that no party may be sued before a court or tribunal to which it has not given its consent.¹⁶ The competence of such fora is laid down in Article 10 of Part IV.

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THE AUTHORITATIVENESS OF THE ENGLISH AND FRENCH TEXTS OF SECURITY COUNCIL RESOLUTION 242 (1967) ON THE SITUATION IN THE MIDDLE EAST

In a recent article in this *Journal* by Dr. Shihata,¹ it is implied that the English text of Security Council Resolution 242 (1967) of November 22, 1967² on the situation in the Middle East should, for purposes of interpretation, enjoy some measure of precedence over the French version.³ This view appears to be based on the fact that English was the original language of the draft resolution⁴ which without change became Security Council Resolution 242 (1967). The underlying issue is now famous. The English and French versions of this resolution are considered to conflict in that the latter provides, literally, for withdrawal of Israeli forces from *all* occupied territories, whereas partial withdrawal would appear to satisfy the requirements of the former.⁵

This note seeks, without in any way addressing the far more problematic question of whether and how the two divergent texts can be reconciled, to resolve a preliminary question by demonstrating that, from the strictly legal viewpoint, the French version of the resolution carries, in every respect, just as much weight as its English counterpart.⁶

¹⁶ The choices include: The Law of the Sea Tribunal, The International Court of Justice, Arbitration, and Special Arbitration Procedures.

* The views expressed are those of the author and do not necessarily reflect those of the Organization.

¹ Shihata, *Destination Embargo of Arab Oil: Its Legality under International Law*, 68 AJIL 591, 604, n. 70 (1974).

² 22 SCOR, RES. & DEC. 8 (1967), 62 AJIL 482 (1968).

³ At the time of the adoption of Resolution 242 (1967), English and French were the only working languages of the Security Council. Rule 41 of the Provisional Rules of Procedure of then read: "Chinese, English, French, Russian and Spanish shall be the official languages of the Security Council, and English and French the working languages." This rule now reads: "Chinese, English, French, Russian and Spanish shall be both the official and the working languages of the Security Council."

⁴ UN Doc. S/8247, November 16, 1967.

⁵ Paragraph 1(i) of the English text speaks of "Withdrawal of Israel armed forces from territories occupied in the recent conflict." The French version of this phrase is "Retrait des forces armées israéliennes des territoires occupés lors du récent conflit."

⁶ The text of a resolution of a UN organ in one of the working languages (designated hereinafter, for ease of reference, as the "most felicitous" language) may, in certain

The rules of procedure of the main organs of the United Nations do not themselves spell out the legal effects attributable to the adoption by such an organ of a particular language as one of its working languages.⁷ Those effects can, however, be inferred, with adequate precision, from the straightforward notion that the working languages of such an organ are the languages it uses to do its work.

Although the two aspects are but two sides of the same coin, this notion can be examined both from the viewpoint of the organ as a whole and from that of any one of its members. From the former viewpoint, the fact that an organ works in a given language necessarily implies that, unless the organ has decided, expressly or implicitly, to depart from its rules of procedure regarding working languages, (1) no proposals can be discussed unless they have been submitted to the organ in all its working languages, (2) a proposal is in every case submitted to the vote in all of those languages, and (3) any decision⁸ of the organ is equally authoritative in every working language.⁹ These three propositions, of which the last is of particular

respects, be closer to the intent of the organ, as revealed by the records, than the texts in the other working languages. (For an example of this, compare the English and French texts of General Assembly Resolution 904(IX) in the light of the observations made thereon by the International Court of Justice in the *South West Africa Voting Procedure* case [1955] ICJ REP. 67 at 72). This does not mean, however, that those texts are not equally authentic with the "most felicitous" language version. The reason why the interpretation conforming more closely to the "most felicitous" language version commends itself is not that the organ meant the "most felicitous" language version to prevail over the other language versions but rather that the travaux préparatoires support that interpretation, which would, therefore, be the correct one even if the "most felicitous" language were not one of the working languages of the organ. (The situation contemplated is not one where the "most felicitous" language version is altogether irreconcilable with the other language versions.) Accordingly, this note does not attempt to ascertain whether either of the two working language versions of Security Council Resolution 242 (1967) is "more felicitous" with respect to whether withdrawal in conformity with operative paragraph 1(i) of the resolution is to be total or not. (It is submitted that such an attempt would prove fruitless, for an objective examination of the records does not reveal the intention of the Security Council in this respect.)

⁷ Cf. rules 51-57 of the Rules of Procedure of the General Assembly, rules 32-35 of the Rules of Procedure of the Economic and Social Council, and rules 41-47 of the Provisional Rules of Procedure of the Security Council. (Contained in UN Docs. A/520/Rev.12 (74.I.6), E/5715 (75.I.15), and S/96/Rev.6 (74.I.5).)

⁸ In the practice of the organs in question, individual instances of formal action by them are designated as either "resolutions" or "decisions." The choice between one or the other of these terms depends, generally, on the nature of the action. Thus, as a rule, the former term is employed when the action is substantive, the latter when it is procedural. But the distinction is not relevant to this note, in which the term "decision" applies to any type of formal action.

⁹ One other proposition that could be inferred is to the effect that every statement must be interpreted into the working languages. It is, however, unnecessary to do so because a provision to that effect is contained in specific rules of procedure of the General Assembly, the Security Council, and the Economic and Social Council. (Cf. rule 51 of the Rules of Procedure of the General Assembly, rule 42 of the Provisional Rules of Procedure of the Security Council, and rule 33 of the Rules of Procedure of the Economic and Social Council.)

importance for the purposes of this note, can be substantiated by simply observing that the discussion, the voting on, and the adoption of decisions are essential elements of the work of any such organ.

Shifting now to the viewpoint of an individual member of one of the organs, it is no less clear that the adoption of certain languages as working languages of that organ means that, in order to participate fully both actively and passively in every aspect of its work, he does not need to know any language other than the particular working language that he has chosen to use.¹⁰ This implies, among other things, that he can submit written proposals drawn up solely in that language. Since, however, any such proposal must, in accordance with propositions (1) and (2) above, be considered and submitted to the vote in all the working languages, it must be translated into the working languages other than the one in which it is originally drawn up. And this task falls on the Secretariat, one of the principal functions of which is to provide UN organs with assistance of this kind. The fact that any member is able to participate fully in the work of the organ even though he uses one and only one of the working languages also means that he can vote on any proposal with as much knowledge of what he is voting on as any other member. Proposition (3) above provides assurance that he can do so.

We come now to the crux of the matter. Let us suppose that a written proposal adopted by the organ was originally drafted in only one of the working languages, the texts in the other working languages being translations made by the Secretariat. Is it reasonable to conclude from this circumstance that the decision ensuing from the proposal is to carry, to however limited a degree, more weight in the original language of the proposal than in its other working language versions? The answer must be no. For the circumstance just described, far from amounting to or involving a decision by the organ to depart from its rules of procedure regarding working languages, is but a normal incident of the application of those rules. The conclusion reached reconciles the right of any member to submit a proposal drawn up exclusively in the working language of his choice with the right of the members using other working languages to vote on the proposal with as much knowledge of what they are voting on as the members working in the original language of the proposal.

¹⁰ In this regard, representatives on UN organs fall into two categories: (1) representatives of states whose official languages are among the working languages of the organ concerned, and (2) representatives of states whose official languages are not among those languages. A representative in the former category will normally work in the language of the state he represents or, in the case of Canada and a few other UN members, in either of the two languages. Those in the second category will normally use the working language of the organ concerned that they know best. It may also occur that they work in more than one of the working languages; the representative of, say, Italy, might, for instance, use English to make statements previously prepared by other officials of his Government, his knowledge of English being sufficient for this purpose, but use French to make unprepared statements because he is more proficient in this language than in English.

Can the fact that the number of members of an organ using a particular working language is larger than that of those who employ any one of the other working languages be used to fault the preceding deductions?¹¹ There can be no doubt that this question is also to be answered in the negative. To the extent that a working language is forced to take second place to any one of its peers with regard to any essential part of the work of the organ, it *ipso facto* ceases, to that extent, to be a working language. And that could only ensue from a decision of the organ to that effect.

There is still another specious argument that requires refutation. One might be tempted to respond to the thesis maintained here by pointing out that the text of a proposal in its original language reflects more accurately the intent of its sponsor than do the versions of the proposal in the other working languages. This is true. And it is no less true that the original language version of the proposal can be presumed closer to the intent of the other representatives working in that language. But the legal significance of these considerations is neutralized by two countervailing observations. The first is that the texts in the other working languages are to be presumed, conversely, to be closer to the intent of the representatives working in those languages than the text in the original language. The second is that the interpretation placed by a sponsor on his proposal does not, for purposes of interpretation, carry more weight than interpretations emanating from other representatives.

Reasons of a practical character argue as strongly in favor of the view advocated here as does purely logical thinking. Let us imagine, *arguendo*, that an organ of the United Nations is bound by the general rule that a resolution resulting from the adoption of a proposal originally drawn up in a particular working language is to have greater authority in that language version than in its other working language versions. The operation of this rule would seriously injure the interests of a member of the organ having to vote on such a proposal if the working language he uses is not the language of the proposal. For, if he is not fully proficient in that language, he will need to resort to an expert therein if he is to cast his vote in full knowledge of all the implications of his action. And his cause for concern would be particularly justified if the proposal deals with a matter of fundamental importance to him.

Yet another possible argument should also be laid to rest. This argument is derived from a detail of the Secretariat's manner of processing reports of organs in which draft reports indicate as the original language only one of the working languages of the organ. The Secretariat's practice in this respect appears to be, in cases where the final report is adopted without changes or with changes drawn up only in the original language of the draft report,¹² to carry over the indication as to original language in the

¹¹ For an attempt to grade working languages on the basis of the number of representatives using (or presumably using) them, see S. Rosenne, *On Multilingual Interpretation*, in 2 *THE ARAB-ISRAELI CONFLICT* 909 (J. N. Moore, ed. 1974).

¹² If any amendments to the draft report that have been submitted in working languages other than the original language have been adopted, the final report indicates,

draft report into the report as adopted.¹³ And this is done *proprio motu* by the Secretariat in the sense that the indication of the original language figuring in the final report does not result from a decision of the organ. (Had it taken such a decision, the organ would be considered, as far as its report is concerned, to have deviated from its rules of procedure in respect of working languages and the inclusion of the indication in the final report would be unobjectionable.) Nevertheless, this practice of the Secretariat, however commendable it may be for editorial reasons, brings no grist to the mill of the supporters of the view which is questioned here. The reason is simply that the practice is legally erroneous: the report of a UN organ (adoption of which constitutes a decision of the organ) is, barring deviations from the rules of procedure concerning working languages, equally authentic in all the working languages of the organ.

It may be noted, finally, that the action taken by the Secretariat in connection with a treaty adopted by the General Assembly established a precedent that is in line with the general thesis sustained here. The treaty in question is the Convention on the Privileges and Immunities of the United Nations, which the General Assembly adopted on February 13, 1946. This Convention, which does not contain any provision regarding its authentic language (or languages), was adopted by the General Assembly on the report of its Sixth Committee. The relevant report¹⁴ of that Committee contained the text of the Convention recommended by the Committee for adoption by the Assembly. Since this text was adopted without change by the Assembly and the report that contained it was marked "Original text: English," the Convention as adopted should, if the position against which this note is aimed is valid, be considered to have only one authentic text, namely the English one. However, the Secretariat, in publishing the Convention in the United Nations Treaty Series, indicated that the authentic languages of the instrument were English and French.¹⁵ Its reason for doing so was that the Assembly's working languages were English and French at the time of the adoption of the Convention.

The records relating to the consideration and adoption of the proposal that became Security Council Resolution 242 (1967) contain no indication

as original languages, that of the draft report and, additionally, those in which the amendments were originally made. An example of this practice is provided by the Report of the Committee on Relations with the Host Country, a subsidiary organ of the General Assembly, to the thirtieth session of the latter. 30 GAOR, Supp. (26), UN Doc. A/10026 (1975). This document is marked (on page iii) "Original: English-French," although the corresponding draft report (UN Doc. A/AC.154/L.61 and Add. 1-3) is marked "Original: English." The reason for this is that during the consideration of the draft report amendments thereto by the representative of France were adopted by the Committee.

¹³ Thus, the report of the Committee mentioned in the preceding footnote to the twenty-ninth session of the General Assembly is marked, on page iii, "Original: English." 29 GAOR, Supp. (26), UN Doc. A/9626 (1974).

¹⁴ 1(1) GAOR, Annex 22, UN Doc. A/43/Rev.1 (1946).

¹⁵ 1 UNTS 15.

that the Council meant to depart from its rules of procedure concerning working languages, which were then exclusively English and French.¹⁶ Thus it is submitted that the two versions of this resolution are of equal weight.

TORIBIO DE VALDÉS

THE DONNELLY CASE, ADMINISTRATIVE PRACTICE AND DOMESTIC REMEDIES UNDER THE EUROPEAN CONVENTION: ONE STEP FORWARD AND TWO STEPS BACK

In its most important decision on an individual application under Article 25 of the European Convention on Human Rights arising out of the conflict in Northern Ireland, the European Commission of Human Rights declared the seven applications joined as *Donnelly et al. v. the United Kingdom* partially admissible on April 5, 1973.¹ After further submissions on the merits by the parties, including the oral evidence of 42 witnesses, the Commission reached its final decision in *Donnelly* on December 15, 1975, although the text of the lengthy decision was not published until May 1976.² The Final Decision reversed the 1973 decision and declared all seven applications inadmissible.³

The background to the *Donnelly* applications and the decision on admissibility were discussed in an earlier issue of this *Journal*.⁴ Exercising the right of individual petition under Article 25, the seven individuals complained that in April 1972, following their arrest under emergency regulations, they were each subjected to "torture, inhuman or degrading treatment" in violation of Article 3 of the European Convention by the police and/or members of the British Army. The applicants complained to the European Commission, however, not only of specific acts of ill treatment but also that the treatment meted out to them was part of "a systematic administrative pattern which permits and encourages brutality." It was this latter claim of "administrative practice" which has given rise to the jurisprudential significance of these applications under the European Convention.

¹⁶ In fact, immediately following the adoption of Resolution 242 (1967), the representative of France stated that the French text of the resolution was "equally authentic with" the English one, and this statement does not conflict with anything said by other representatives. 22 SCOR (1382d mtg.) para. 111 (1967).

¹ Applications Nos. 5577-5583/72, Decision on Admissibility of 5 April 1973, 16 YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 212 (1973) (hereinafter YEARBOOK).

² Applications Nos. 5577-5583/72, Final Decision of the Commission taken under Articles 26, 27 and 29 of the Convention, 15 December 1975 (hereinafter cited as Final Decision).

³ *Id.* 86.

⁴ K. Boyle and H. Hannum, *Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice: the Donnelly Case*, 68 IJIL 440 (1974).

In its Report on the Greek Case, the Commission defined an administrative practice as consisting of "a *repetition of acts*" in conjunction with "*official tolerance*" of practices which are incompatible with the guarantees of the Convention.⁵ Such a practice could clearly exist in the absence of any legislation directing or approving the activities as well as in the face of contrary legislation which theoretically outlaws the practices complained of.

The issues posed for the Commission by the claim of administrative practice in *Donnelly* were twofold. Were the applicants entitled to complain that their alleged ill-treatment was part of a practice of ill-treatment of terrorist suspects which was tolerated at the material time by the government authorities in Northern Ireland? What effect would the existence of such a practice have on the Convention's requirement that local remedies should be exhausted before invoking the jurisdiction of the Commission?⁶

In its 1973 decision on admissibility, the Commission held first that there was nothing in the European Convention on Human Rights to prevent an individual from raising a complaint of an alleged administrative practice in breach of the Convention, provided he offered *prima facie* evidence of such a practice and of his being a victim of it.⁷ The Commission further held that where a complaint raised an issue of the existence of such a practice, again assuming *prima facie* proof, the rule set out in Article 26 which requires an applicant first to exhaust domestic remedies, was inapplicable.⁸ The Commission therefore declared admissible the allegations of the seven individuals that they were victims of an administrative practice contrary to Article 3 of the Convention, while it joined to the merits the separate issue of whether, as alleged victims of specific acts, apart from any administrative practice, the applicants had exhausted domestic remedies as normally required by Article 26.⁹

Having heard the evidence and submissions of the parties, the Commission in its Final Decision in 1975 declared that it was the issues concerning domestic remedies, joined to the merits at admissibility, which fell to be decided first.¹⁰ Noting that the possibility of obtaining compensation for violations of rights is normally considered an adequate remedy, the Commission proceeded to consider whether there were any "special circumstances" which would nevertheless absolve the applicants from exhausting the available remedy of compensation.¹¹ This turned on whether the local remedies in Northern Ireland were "adequate and effective," as it has long been recognized that illusory or ineffective remedies need not be formally exhausted to comply with the requirements of Article 26.¹²

⁵ Applications Nos. 3321, 3322, 3323, 3344/67, Denmark *et al.* v. Greece, 12 YEARBOOK, Supp. The Greek Case, 194-96 (1969).

⁶ Boyle and Hannum, *supra* note 4, at 445, 456.

⁷ *Supra* note 1, at 260.

⁸ *Id.* 262.

⁹ *Id.* 266.

¹⁰ Final Decision 61.

¹¹ *Id.* 65.

¹² Application No. 788/60, Austria v. Italy, 4 YEARBOOK 116 (1961); Boyle and Hannum, *supra* note 4, at 447-49.

Considering first the *effectiveness* of the remedies, the Commission concluded that, on the basis of the facts before it, the legal machinery for providing compensation had not been shown to be ineffective in practice.¹³ This finding seemed to rest primarily on the fact that the heads of the security forces in Northern Ireland are vicariously liable for the torts of individual officers, although at the same time the Commission accepted that a police "cover-up" had occurred in at least some cases and that relevant evidence had been suppressed both in domestic inquiries and before the Commission by members of the security forces.¹⁴

The Commission next examined the *adequacy* of the remedies in relation to the seven individual applicants. In an important statement the Commission declared that compensation by itself, while normally an adequate remedy, would *not* be sufficient "where the State had not taken reasonable measures to comply with its obligations under Article 3," or where the higher authorities of the state "pursued a policy or administrative practice whereby they authorized or tolerated conduct in violation of Article 3."¹⁵

In its examination of the facts, the Commission paid particular attention to the investigations of the applicants' complaints by the domestic police authorities. While it found that the investigations were open to criticism on certain grounds, it also noted that they were conducted reasonably promptly and that a small number of prosecutions of security force members did occur.¹⁶ The applicants submitted that the evidence disclosed repeated ill-treatment of terrorist suspects and toleration of such ill-treatment by at least immediate superiors of those responsible, which thus rendered any domestic remedies (including compensation) inevitably inadequate and incapable of redressing the complaints.¹⁷

The Commission rejected this argument and, in the key holding of the decision, concluded that

... it has not been established that any ill-treatment which the present applicants may have suffered was condoned or tolerated by persons in authority other than those directly involved with the applicants at the relevant times. . . . The fact that ill-treatment may be tolerated, at the middle or lower levels of the chain of command, for example at the level of an officer in charge of a police station or military post, does not in the opinion of the Commission, necessarily mean that the state concerned has failed to take the required steps to comply with its substantive obligations under Art. 3 of the Convention. Existing remedies which provide redress for the individual victims of ill-treatment are not therefore necessarily rendered inadequate in such a situation.¹⁸

¹³ Final Decision 75. Between August 9, 1971 and September 30, 1975, 798 tort actions alleging assaults by the security forces were commenced in Northern Ireland, of which number 222 cases were settled out of court during the same period for damages totalling £420,000. *Id.* 45.

¹⁴ *Id.* 65-75.

¹⁶ *Id.* 81-82.

¹⁸ *Id.* 82.

¹⁵ *Id.* 76.

¹⁷ *Id.* 33-35, 44-49.

Finding that there was no toleration of ill-treatment at the higher levels of the state and that it had not been established that the state had failed to take "reasonable measures" to prevent such ill-treatment, the Commission concluded that there were no special circumstances which would render the normally sufficient remedy of compensation inadequate. The Commission therefore declared the seven applications, in so far as they complained of being victims of specific acts in violation of Article 3, inadmissible on the grounds of nonexhaustion of domestic remedies (in the case of three applicants) or of having already received compensation in full satisfaction of their claims.¹⁹

The Commission held that the grounds for the inadmissibility of the applicants' allegations that they were victims of "specific acts" in violation of Article 3 were "equally applicable" to their separate allegations of being victims of an administrative practice in violation of Article 3. Finding that the remedy of compensation had not been rendered ineffective or inadequate by the existence of an administrative practice or otherwise, the Commission unanimously rejected the applications under the provisions of Article 29 of the Convention, in so far as they had already been declared admissible in 1973.²⁰

The Commission in the Final Decision in *Donnelly* has clearly taken the opportunity to refine the notion of an administrative practice in violation of the Convention. For the first time a distinction is drawn between a practice tolerated or authorized at the highest levels of government and a practice at the middle or lower levels, for example among ranks of army or police. A practice established only at the lower level does not appear to involve a violation of the Convention, without further proof of authorization or tolerance at the higher level.

The individual applicant may put in issue before the Commission a practice at either level only if he proves that it interferes with his domestic remedies. This appears to reverse the Commission's view in the 1973 admissibility decision that, "where an applicant under Article 25 submits evidence, *prima facie* substantiating both the existence of an administrative practice . . . and his claim to be a victim of acts part of that practice, the domestic remedies' rule in Article 26 does not apply to that part of his application."²¹ It now appears that the *prima facie* proof of an administrative practice produced by an applicant at the admissibility stage raises a rebuttable presumption only that remedies are inadequate. In that event

¹⁹ *Id.* 84. Four of the applicants accepted out-of-court settlements ranging from £300 to £6,000.

²⁰ *Id.* 85-86. Article 29, as amended by Protocol No. 3 to the Convention, provides that, after it has accepted an application under Article 25, the Commission may nevertheless unanimously decide to reject the application if, in the course of its examination, it finds that the existence of one of the grounds for nonacceptance provided for in Article 27 has been established. Cf. F. CASTBERG, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 66-67 (1974).

²¹ *Supra* note 1, at 262.

the more logical course for the Commission to adopt would be to join the administrative practice-domestic remedy issue to the merits rather than declare an application admissible and later invoke the unusual procedure of Article 29 (as was done in *Donnelly*), when the remedies are subsequently determined to be adequate.²²

In determining whether the individual's domestic remedies were interfered with by the existence of an administrative practice, the Commission presumably will still need to determine that such practice did exist and at what level of government it existed. A major question left unanswered by the Final Decision involves how proof of "official tolerance" of a practice at the highest level of government is to be established by an applicant.

Bearing in mind the Commission's findings in *Donnelly* concerning police cover-ups and suppression of evidence, it is clear that tolerance of ill-treatment by immediately responsible superiors is now insufficient proof of such high level tolerance despite language to the contrary in the *Greek* case.²³ In the *Donnelly* case, evidence heard by the Commission was restricted to the alleged ill-treatment of the applicants themselves and did not directly involve the larger issue of proof of official tolerance. Apart from the facts of ill-treatment, the evidence presented concerned the adequacy and effectiveness of remedies.²⁴ Nevertheless the Commission determined that there was no official tolerance of any administrative practice at the highest levels of government. The fact that four of the applicants had accepted compensation and that prosecutions, albeit unsuccessful, were instituted against members of the security forces as a result of complaints by three of the applicants undoubtedly influenced the Commission's finding on official tolerance. However inferences about official tolerance or the lack of it from the evidence about remedies can lead to circular reasoning. Compensation alone is said to be an adequate and effective remedy, only if there is no official tolerance of human rights violations by the government, but proof of this lack of official tolerance appears to be presumed in *Donnelly* largely from the evidence on the workings of the compensation machinery.

More disquieting than changes in the definition of administrative practice is the Commission's holding that tolerance of ill-treatment in violation of the Convention at the lower or middle level of the state's security forces, even if it occurs "repeatedly," does not constitute a breach of the Convention if the state takes "reasonable measures" to prevent such occurrences.²⁵ What measures are "reasonable" would fall ultimately to be determined by the Commission, but it is likely that a government would enjoy some presumption that its attempts to halt violations were "reasonable," akin to the concept of "margin of appreciation" that the Commission has employed in

²² Cf. McGovern, *The Local Remedies Rule and Administrative Practices in the European Convention on Human Rights*, 24 INT. COMP. L.Q. 121 (1975).

²³ *Supra* note 5, at 194.

²⁴ See Final Decision 5, 9, 49.

²⁵ *Id.* 76, 82.

determining whether measures taken in derogation of a state's obligation are in fact limited to those required by the exigencies of the situation.²⁶

This view of the obligations of a government under the Convention could permit a situation which the applicants argued would allow a state to "pay for the right to torture."²⁷ In the context of civil strife or disturbance, a situation might easily arise where a practice of ill-treatment contrary to Article 3 would continue as long as field commanders and police superintendents tolerated it, despite the existence of means for identifying the occurrence of torture (through providing for medical examination of detainees) and for paying compensation to individual victims (legal machinery and an independent judiciary). In such a situation, absent a positive showing of official tolerance by "higher authorities" of the state, compensation would appear to be an adequate and effective remedy under the Commission's decision, and reference to other victims or to an alleged widespread practice of torture would be immaterial.

In so far as *Donnelly* represents a modification of the function of an administrative practice as explained in the *Greek* case, one explanation may lie in the quite different factual situations which gave rise to the two cases. Nevertheless from the perspective of the individual applicant under the Convention, the Commission has clearly retreated from the "welcome and meaningful advance" presaged by its initial admissibility decision in 1973.²⁸ Unless it can be shown to have specifically inhibited the individual applicant's remedy of compensation or unless authorization or tolerance can be shown to exist at the "higher levels" of the state itself, the question of the existence of an administrative practice in violation of any provisions of the Convention now seems to be immaterial to Article 25 applications. Certainly the individual applicant is now denied the right to raise any substantive issue of widespread violations of human rights, even though he himself may be a victim of such violations, except in so far as such violations may directly affect the remedies available to him under domestic law. In this respect, the Commission seems to have accepted the contention that the only proper object for an individual complaint under Article 25 is to seek redress for what has been done to that individual, leaving any "breach of the public order of Europe" to the more political province of interstate applications under Article 24.²⁹

Hurst Hannum * †

Kevin Boyle ** †

²⁶ See Article 15 of the Convention; Cf. F. G. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 201-02, 204-09 (1975); and J. E. S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 245-50 (1969).

²⁷ Final Decision 54.

²⁸ Boyle and Hannum, *supra* note 4, at 453.

²⁹ Final Decision 36. In the recently published Report of the interstate proceedings, arising out of the Northern Ireland situation, *Ireland v. United Kingdom*, the Commission concluded, *inter alia*, that the application of certain techniques of interrogation against detainees, at an unknown interrogation center, on various dates from August 1971, constituted a practice of inhuman treatment and torture in breach of Article 3 of the Con-

THE BOUNDARY DISPUTE BETWEEN PERU AND ECUADOR

In an article in this *Journal* some years ago, Professor Georg Maier analyzed the legal cases presented by the Republics of Peru and Ecuador during their long boundary dispute and concluded that the Ecuadorian Government had a much stronger de jure title to the disputed territory, while the Peruvian Government's claim rested primarily on a strong de facto title.¹ Consequently, he argued that the 1942 Rio Protocol which awarded the Peruvian Government the bulk of the territories in question was not an equitable solution to the dispute since such a solution would lie between the extremes of Ecuador's de jure case and Peru's de facto case.² He further concluded that a more equitable solution should be sought so the dispute would no longer be an impediment to amicable relations between the two countries. The conclusion of this writer is that the Peruvian Government's de jure case in the dispute was stronger than that of the Ecuadorian Government and that Peru's legal case was then buttressed by a prolonged occupation and development of much of the disputed area. Furthermore, even if the Rio Protocol was not an equitable solution to the problem, no legal justification exists for demanding the renegotiation of a pact signed and ratified by both the Peruvian and Ecuadorian Governments and then guaranteed by four other American Governments.

The geographical area disputed by the Republics of Ecuador and Peru consisted of three separate territories: Tumbes, Jaén, and Maynas.³ Tumbes was a desert area of approximately 500 square miles on the Pacific seaboard between the Tumbes and Zarumilla Rivers. Jaén, an area of less than 4,000 square miles, lay on the eastern side of the Cordillera of the Andes between the Chinchipe and Huancabamba Rivers. As Maier pointed out, both Tumbes and Jaén were subject to Peruvian sovereignty after 1822, the year Peru became an independent state.⁴ Maynas, the third and

vention. It was further held that in the fall of 1971, there had been a practice of inhuman treatment at one other interrogation center, which had been tolerated at the level of the government authorities. Application No. 5310/71, Ireland against the United Kingdom of Great Britain and Northern Ireland, Report of the Commission adopted on January 25, 1976).

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¹ G. Maier, *The Boundary Dispute Between Ecuador and Peru*, 63 AJIL 28-46 (1969).

² The Protocol of Peace, Friendship, and Boundaries was signed at Rio de Janeiro on January 29, 1942.

³ For maps of the disputed areas, see F. DE LA BARRA, *TUMBEZ, JAEN, Y MAYNAS* 48 (1961) and PERU, MINISTERIO DE GUERRA, *BIBLIOTECA MILITAR DEL OFICIAL* No. 31: *ESTUDIO DE LA CUESTION DE LIMITES ENTRE EL PERU Y EL ECUADOR* 37, 40 (1961).

⁴ *Supra* note 1, at 28-29. A. WAGNER DE REYNA, *LOS LIMITES DEL PERU* 41 (1962); L. A. Wright, *A Study of the Conflict between the Republics of Peru and Ecuador*, 98 GEOGRAPHICAL JOURNAL 253 (1941). The population of Jaén adhered to the Republic of Peru in 1821 and their representatives attended the Peruvian Congresses of 1822, 1826, and 1827. Representatives of Tumbes also attended these first three congresses.

largest of the disputed territories, included well over 100,000 square miles of land. It was a triangularly shaped region outlined by the headwaters of the Amazon tributaries on the west, the Yapurá or Caquetá Rivers on the north, and the Chinchipe-Marañón-Amazon Rivers on the south. After independence, much more of the vast area of Maynas was under the jurisdiction of Peru than Ecuador, but the inhospitable character of the terrain limited either country's capacity to occupy all of it effectively.⁵

The conflicting territorial claims of the Peruvian and Ecuadorian Governments arose from the uncertainty of Spanish colonial administrative and territorial divisions. Colonial jurisdictions were often vague and overlapping, while boundary surveys were either inadequate or nonexistent. Consequently, even when South American Republics agreed that their new national boundaries should reflect those of the former colonial administrative units, they still found it extremely difficult to delineate their frontiers. In this regard, the territorial dispute between Peru and Ecuador was typical rather than unique in the post-independence period since all of the new South American Republics were involved in one or more boundary disputes.⁶

The principal legal arguments of the Peruvian and Ecuadorian Governments centered on conflicting interpretations of the rule of *uti possidetis de jure*.⁷ Under this rule of regional international law, the Latin American states formerly a part of the Spanish Colonial Empire agreed to fix their international boundaries along the same lines as the former colonial administrative areas. While *uti possidetis* was generally accepted by all Latin American states, it has no validity in universal international law, and even in Latin America the parameters of its application have remained uncertain. Furthermore the complexity of colonial documents and the fact that colonial boundaries were vaguely defined and inaccurately drawn have always made any attempt to apply the rule of *uti possidetis* extremely difficult.⁸

⁵ WAGNER DE REYNA, *supra* note 4, at 41; Wright, *supra* note 4, at 254. Maynas was liberated from Spanish rule in 1821 but had to be reliberated in 1822. Representatives from Maynas attended the 1826 and 1827 Peruvian Congresses. Maynas, also spelled Mainas, is frequently referred to as the Oriente.

⁶ B. WOOD, *THE UNITED STATES AND LATIN AMERICAN WARS, 1932-1942* at 3 (1966). Approximately thirty boundaries demarcated the Latin American states at the time of independence, and disputes over the location of twenty of them lasted into the twentieth century. The Republic of Peru, for example, had prolonged border disputes with all five of its neighbors, and none of these conflicts was resolved before the turn of this century.

⁷ For examinations of the respective legal cases, see F. Morales Padrón, *La frontera peruano-ecuatoriana*, 2 ESTUDIOS AMERICANOS 455-66 (1950); PERU, DOCUMENTOS RELATIVOS A LA CONFERENCIA PERU-ECUATORIANA DE WASHINGTON, 49-81 (1938); E. ARROYO DELGADO, *LAS NEGOCIACIONES LIMITROFES ECUATORIANO-PERUANAS EN WASHINGTON*, 44-53 (1939); and Pastoriza Flores, *History of the Boundary Dispute Between Ecuador and Peru 67-70* (1921) (unpublished doctoral dissertation, Columbia University).

⁸ G. SCHWARZENBERGER, *INTERNATIONAL LAW* 1, 21, 304-05 (1957). As Schwarzenberger points out, the Guatemala-Honduras Boundary Arbitration of 1933 is a good example of the uncertainties of the rule of *uti possidetis*. The Special Boundary Tribunal in that arbitration left open the question of whether possession in 1821 meant

The Republic of Ecuador based its case for the application of *uti possidetis* on a series of decrees published by the King of Spain starting in 1563 with a *cédula* awarding Maynas, Quijos, Jaén, and any adjoining land, *i.e.*, the whole of the area in dispute, to the *Audiencia* of Quito. Ecuador maintained, under the doctrine of *uti possidetis* and the *cédulas* of 1563, 1717, 1739 and 1740, that the disputed territories were first part of the *Audiencia* of Quito, then part of Gran Colombia, and finally became part of the Republic of Ecuador when it emerged in 1830 after the breakup of Gran Colombia.⁹ The Republic of Peru argued that the essence of independence in the Americas was the sacred and inalterable character of movements of self-determination. Within this greater principle, the Peruvian Government argued that *uti possidetis* served only as a guide to the demarcation of actual boundaries and not as a basic principle for the assignment of provinces or the organization of states.¹⁰ Peru had a strong legal case here since a corollary to the rule of *uti possidetis* existed which gave provinces the right to attach themselves to the republic of their choosing.¹¹ From this argument, the Peruvian Government concluded that the territories in question were Peruvian because the population of Jaén, Tumbes, and Maynas had voluntarily adhered to Peru at the time of Peru's independence and several years before the independence of Ecuador.¹²

The Peruvian Government developed two refinements to its general argument that the principle of self-determination was most relevant to the question of the ownership of Jaén, Tumbes, and Maynas. Through a *cédula* on July 15, 1802, the King of Spain separated for ecclesiastic and military purposes the provinces of Maynas and Quijos, except Papallacta, from the Viceroyalty of New Granada and transferred them to the Viceroyalty of Peru. The Peruvian Government claimed that the *cédula* of 1802 was a valid guide for determining the jurisdiction of Maynas; however, it always put forth this claim as secondary to its title to the area based on the principle of self-determination. Ecuador unconvincingly attempted to counter

de jure or de facto possession. Furthermore, the Tribunal found it difficult to determine the actual frontier line in 1821 because the Spanish colonial administration had never fully established frontiers nor even established administrative authority in many areas of the border zone.

⁹ Morales Padrón, *supra* note 7, at 458; Flores, *supra* note 7, at 67-70; and Arroyo Delgado, *supra* note 7, at 44-53.

¹⁰ PERU, RESUME OF THE HISTORICAL-JURIDICAL PROCEEDINGS OF THE BOUNDARY QUESTION BETWEEN PERU AND ECUADOR 3, 14 (1937); F. TUDELA, THE CONTROVERSY BETWEEN PERU AND ECUADOR 12-38 (1941); PERU, THE QUESTION OF THE BOUNDARIES BETWEEN PERU AND ECUADOR (hereinafter cited as QUESTION); Statement of the Peruvian Delegation to the Washington Conference concerning the scope of the boundary negotiations with Ecuador, in accordance with the Protocol of the 21st of June, 1924, within the historical-juridical process of the controversy, 6-7 (1927); and A. ULLOA SOTOMAYOR, POSICION INTERNACIONAL DEL PERU 17 (1941).

¹¹ Maier, *supra* note 1, at 36.

¹² R. PORRAS BARRENECHEA, EL LITIGIO PERU-ECUATORIANA ANTE LOS PRINCIPIOS JURIDICOS AMERICANOS 7 (1942) and M. H. CORNEJO AND F. DE OSMA, MEMORANDUM FINAL PRESENTADO POR LOS PLENIPOTENCIARIOS DEL PERU EN EL LITIGIO DE LIMITES CON EL ECUADOR 16-17 (1909).

this argument and pressed for the applicability of the older colonial decrees only by claiming that the *cédula* of 1802 separated Maynas and Quijos from the *Audiencia* of Quito for ecclesiastical and administrative ends but not in any political sense.¹³ The Peruvian Government also argued that the principle of *uti possidetis* was not applicable until the complete end of colonial dependence, which it interpreted to be the 1824 Battle of Ayacucho. Since 1810 was generally accepted in Latin America as the year from which *uti possidetis* was applicable, Ecuador refused to consider the later date of 1824, especially since by that year the populations of Jaén, Tumbez, and Maynas had all expressed their intention to become a part of the Republic of Peru.¹⁴

The three other documents of legal importance to the dispute were the treaties of 1829 and 1832 and the supposed Pedemonte-Mosquera Protocol of 1830. The first document, the Treaty of Peace signed by Gran Colombia and the Republic of Peru at Guayaquil on September 22, 1829,¹⁵ recognized as the boundary between the signatories the limits of the ancient Viceroyalties of New Granada and Peru. However, while the 1829 treaty established a commission of limits to fix the boundaries, it neither established a clear boundary line nor definitely settled the boundary question; it merely specified a procedure to be followed. The treaty did not even mention Jaén, Tumbez, or Maynas, much less impose on Peru a specific obligation to surrender those territories. Article VI of the 1829 treaty left the final solution of the problem to the boundary commissioners. Treaty ratifications were exchanged on October 27, 1829, but Gran Colombia ratified unconstitutionally without congressional approval.¹⁶ Boundary negotiations between the Governments of Peru and Gran Colombia were halted in May of 1830 when the latter state split into the three secessionist states of Venezuela, Ecuador, and Colombia. Two years later on July 12,

¹³ PERU, QUESTION, *supra* note 10, at 15-7; Morales Padrón, *supra* note 7, at 458; D. H. ZOOK, ZARUMILLA-MARAÑÓN: THE ECUADOR-PERU DISPUTE 28-29 (1964); and A. WAGNER DE REYNA, HISTORIA DIPLOMATICA DEL PERU, 1900-1945, 1, at 173 (1964). Maier (*supra* note 1, at 34) was incorrect in stating that the Republic of Peru based its legal claim on this document as its claim based on the *cédula* of 1802. was always secondary to the title based on the principle of self-determination.

¹⁴ V. SANTAMARIA DE PARÉDES, A STUDY OF THE QUESTION OF BOUNDARIES BETWEEN THE REPUBLICS OF PERU AND ECUADOR 277-80 (1910) and ULLOA, *supra* note 10, at 19-20.

¹⁵ Art. XIV. 20 BRIT. AND FOR. STATE PAPERS 1311, 13 MARTENS, NOVEAU RECUEIL 23, 82 PARRY, CONSOLIDATED TREATIES SERIES 463.

¹⁶ PERU, QUESTION, *supra* note 10, at 10; WAGNER DE REYNA, *supra* note 13, at 25; Flores, *supra* note 7, at 33, 38-40, 44-45; J. PEREZ CONCHA, ENSAYO HISTORICO-CRITICO DE LAS RELACIONES DIPLOMATICAS DEL ECUADOR CON LOS ESTADOS LIMITROFES 145-47 (1959). L. H. Woolsey, *The Ecuador-Peru Boundary Controversy*, 31 AJIL 98-99 (1937). Maier was inaccurate in his statement that the 1829 treaty was duly ratified by both signatories as Gran Colombia's ratification was imperfect. He was misleading to suggest that the treaty provided for a "clear and unambiguous definition of the boundary" as the exact boundaries of the Viceroyalties of Peru and New Granada were uncertain which was the reason the treaty provided for a commission of limits. *Supra* note 1, at 38.

1832, the Governments of Peru and Ecuador agreed in a Treaty of Friendship, Alliance, and Commerce¹⁷ to recognize and respect their present limits until a boundary convention was negotiated. The treaty did not specify, however, whether the phrase "present limits" referred to the territories then in the physical possession of the Governments of Peru and Ecuador or to the territories of the Viceroyalties referred to in the treaty of 1829. The Peruvian Government later insisted on the first interpretation and the Ecuadorian Government on the second.¹⁸

Several basic points were in contention between the Peruvian and Ecuadorian Governments when they argued over the applicability of the 1829 and 1832 treaties. First, there was the question of the extent to which the 1829 treaty actually fixed a boundary. The Ecuadorian Government maintained that the treaty definitely settled the question, while the Peruvian Government argued that it established a principle of delimitation and a procedure to be followed rather than an actual line. In support of its position, the Ecuadorian Government later introduced the Pedemonte-Mosquera Protocol into its legal brief. According to Ecuador, the Peruvian Foreign Minister, Carlos Pedemonte, and the Gran Colombian Minister to Peru, General Tomás C. Mosquera, agreed to a protocol on August 11, 1830, which determined the basis of departure for the border commissioners established in the 1829 treaty. In this protocol, the Peruvian representative supposedly accepted the Marañón River as a frontier leaving in doubt only whether the border would be completed with the Chinchipe or Huancabamba Rivers. The Peruvian Government never accepted the authenticity of this protocol, and, to prove its point, showed that General Mosquera sailed from Lima's port, Callao, on August 10, the day before the protocol was theoretically signed. It also argued that Mosquera had ceased to represent Gran Colombia by August 11 and that, in fact, Gran Colombia had ceased to exist because Venezuela seceded before that date.¹⁹

The second basic point in contention was whether or not the Republic of Ecuador was legally the party to assume the rights and obligations of the Republic of Gran Colombia, when that national entity ceased to exist. As Brierly has pointed out, when a state ceases to exist, its treaty rights and obligations generally cease with it.²⁰ Therefore, since Gran Colombia

¹⁷ Art. V. 16 BRIT. AND FOR. STATE PAPERS 1242, 9 MARTENS, NOVEAU RECUEIL 26, 80 PARRY, CONSOLIDATED TREATIES SERIES 97.

¹⁸ SANTAMARIA DE PAREDES, *supra* note 14, at 29, 247-48; TUDELA, *supra* note 10, at 27-28.

¹⁹ L. ULLOA CISNEROS, ALGO DE HISTORIA. LAS CUESTIONES TERRITORIALES CON ECUADOR Y COLOMBIA Y LA FALSEDAD DEL PROTOCOLO PEDEMONTÉ-MOSQUERA (1911); Wright, *supra* note 4, at 265; PERU, QUESTION, *supra* note 10, at 10. The Colombian Government had a copy of the Pedemonte-Mosquera Protocol but did not mention it until 1904, and the Ecuadorian Government first introduced it into its legal brief in an *Exposición* filed on October 20, 1906. The Peruvian Government also pointed out that a document of such importance as the Pedemonte-Mosquera Protocol would have required congressional approval if it had existed and none was given.

²⁰ J. L. BRIERLY, THE LAW OF NATIONS 153 (6th ed., 1963).

split into three secessionist states in 1830, it is difficult to accept Maier's argument that the Ecuadorian Government would legally assume the treaty rights and obligations of Gran Colombia including the 1829 treaty. Furthermore, even if the doctrine of the succession of states had limited applicability, it could not make the Republic of Ecuador the successor to Gran Colombia's boundary to the south because that boundary had never been fixed. In fact, the boundary commission provided for in the 1829 treaty never met.²¹

The third major point of disagreement concerned the interrelationship of the treaties of 1829 and 1832. The Government of Peru argued that the 1832 treaty both nullified the treaty of 1829 and recognized Peruvian possession of Jaén, Tumbez, and Maynas.²² The Ecuadorian Government contended that the 1829 treaty fixed a final boundary which was unaffected by the 1832 treaty. In supporting Ecuador's case, Maier suggested that the treaty of 1832 was never in force because ratifications were never exchanged. This was incorrect, as the Governments of Peru and Ecuador exchanged ratifications on December 27, 1831, and the Ecuadorian Foreign Minister acknowledged receipt of the ratified treaties on March 13, 1833.²³ As for Peru's argument that the treaty of 1832 rendered the treaty of 1829 null and void, there was no such statement in the treaty of 1832, but, as we have seen, it was far from clear that Ecuador inherited the rights and obligations of the 1829 treaty. In any case, since the treaty of 1829 did not fix a boundary, it was impossible to state unequivocally whether the "present limits" mentioned in the treaty of 1832 referred to the Viceroyalties of Peru and New Granada mentioned in the treaty of 1829 or to those territories in the actual possession of Peru and Ecuador when the treaty was signed. Therefore, Maier's conclusion that the 1832 treaty provided a status quo recognition of the boundaries between the Republics of Peru and Ecuador was meaningless because there was absolutely no agreement between the two states as to where the status quo lay.²⁴

Between 1833 and 1887, the Peruvian and Ecuadorian Governments defended their respective legal cases while Peru continued to occupy Jaén, Tumbez, and much of Maynas. The dispute was not brought before any legal body in this period, but if it had been, the Peruvian Government appeared to have the stronger *de jure* case. If the rule of *uti possidetis* was applied to the issue, all of Spain's administrative acts up to the time of independence had to be considered, including the *cédula* of 1802. Furthermore, since the corollary to *uti possidetis* giving provinces the right to choose the republic they would adhere to would also have had to be ac-

²¹ *Supra* note 1, at 39.

²² PERU, QUESTION, *supra* note 10, at 10; TUDELA, *supra* note 10, at 12-38; L. A. EGUIGUREN, NOTES ON THE INTERNATIONAL QUESTION BETWEEN PERU AND ECUADOR. Part I. Maynas, 149 (1941).

²³ ZOOK, *supra* note 13, at 23-24. Ecuador's ratification was imperfect and its original copy of the ratified treaty was later misplaced. On March 26, 1846, the Ecuadorian Government received an authenticated copy of the 1832 treaty from the Peruvian Foreign Ministry.

²⁴ *Supra* note 1, at 40.

cepted as valid, Peru had a strong argument that the issue was not one of deciding the ownership of vast tracts of land but rather simply an issue of fixing the boundary between Ecuador and three provinces which had opted at the time of independence to become part of Peru. Under the doctrine of succession of states, Ecuador may have inherited limited rights to the boundary procedure outlined in the 1829 treaty, but that document was a weak foundation for a legal claim as it simply outlined a procedure which was never followed. As for the Pedemonte-Mosquera Protocol, its authenticity was so debatable that its introduction as a central pillar of Ecuador's legal case undoubtedly weakened that case rather than strengthening it. Finally, while the treaty of 1832 was duly signed and ratified, the ambiguous wording of the pact added very little support to either country's legal case. In addition to the relative strengths of Peru's *de jure* case, it then had the growing strength of its *de facto* case since it had occupied and continued to develop economically both Jaén and Tumbez since 1822 as well as much of Maynas.

In 1887, the Republics of Peru and Ecuador agreed to submit the legal aspects of their cases to the arbitral judgment of the King of Spain.²⁵ In the entire history of the dispute, the Spanish arbitration was the only time the two countries had anything resembling a day in court, and it is, therefore, significant that the representatives appointed by the King of Spain accepted almost all of the Peruvian Government's legal arguments. The projected award of the Spanish arbitration rejected Ecuador's attempt to reconstitute Viceroyalties and *Audiencias* dating back to 1563 and agreed with Peru's central argument that the real issue was one of fixing the boundaries between the different provinces that, at the time of independence, chose to join one state or the other. Accepting the rule of *uti possidetis*, the award further agreed that all of Spain's administrative acts up to the very moment of independence were applicable and not merely old decrees and thus accepted the validity of the royal *cédula* of 1802. As for the documents central to Ecuador's case, the award rejected the 1829 treaty saying Ecuador had lost its rights as a successor to Gran Colombia in the question when it signed the 1832 treaty. The award also concluded that the Pedemonte-Mosquera Protocol lacked authenticity, as well as the approval which was required from the Peruvian and Ecuadorian Congresses. Finally, the projected award agreed that the 1832 treaty had been ratified and that the ratifications were duly exchanged.²⁶ The projected award of the Spanish arbitration was disastrous for Ecuador's territorial pretensions, and when the terms became known, violent demonstrations broke out in Ecuador. For a time, war between Peru and Ecuador seemed imminent, and the clamor subsided only after the King of Spain resolved in November 1910, not to pronounce a sentence.

²⁵ Convention between Ecuador and Peru, signed at Quito, Aug. 1, 1887, 78 BRIT. AND FOR. STATE PAPERS 47.

²⁶ PERU, THE QUESTION OF THE BOUNDARIES BETWEEN PERU AND ECUADOR: A HISTORICAL OUTLINE COVERING THE PERIOD SINCE 1910, at 12-18 (1936); Flores, *supra* note 7, 56-62; TUDELA, *supra* note 10, at 12-38.

After the King of Spain ended the Spanish arbitration, the Republic of Peru agreed to bring the dispute before the Hague Tribunal, but the Republic of Ecuador declined.²⁷ Confident in its legal right to the disputed territories, the Peruvian Government continued to demand a *de jure* arbitration of the dispute after 1910, while Ecuador insisted on a solution *de aequitate* either through arbitration or direct negotiations which would take into account what it saw as its moral right to an exit to the Amazon River.²⁸

After fighting broke out along the frontier in 1941, the Ecuadorian and Peruvian Governments finally signed a Protocol of Peace, Friendship, and Boundaries in early 1942 which established a definite boundary between the two states.²⁹ The final settlement, largely the product of the mediatory efforts of the Governments of Argentina, Brazil, Chile, and the United States, was also guaranteed by these four states.³⁰ Therefore, Maier's final conclusion that the dispute should be reopened would be difficult to achieve even if it were justifiable, as both signatories and all four guarantors would have to agree to a proposal which only the Ecuadorian Government supports. The Peruvian Government is very satisfied with the provisions of the 1942 Protocol, and the four countries guaranteeing it have taken the position that a basic principle of international law is that a unilateral determination on the part of one party to a treaty of limits is not enough to invalidate the treaty or free the party from its obligations.³¹ In seeking to

²⁷ ULLOA, *supra* note 10, at 179-82; Wright *supra* note 4, at 269; 8 J. BASADRE, *HISTORIA DE LA REPUBLICA DEL PERU*, 3582-83 (5th ed., 1963).

²⁸ For an examination of Peruvian and Ecuadorian negotiating positions between 1910 and 1942, see Ronald Bruce St John, *Peruvian Foreign Policy, 1919-1939: The Delimitation of Frontiers* 271-89, 429-93 (1970) (unpublished doctoral dissertation, University of Denver). PERU, *supra* note 7, at 30-40; ZOOK, *supra* note 13, at 146, 148; PERU, *CONFERENCIA DE WASHINGTON PARA LA CUESTION DE LIMITES ENTRE EL PERU Y EL ECUADOR*. Réplica de la delegación peruana a la contraproposición ecuatoriana del 9 de agosto de 1937, 1-13 (1937). In 1935, 1937, and 1938, the Peruvian Government proposed submitting part or all of the dispute to the Permanent Court of International Justice at the Hague, but the Ecuadorian Government refused all three proposals. Ecuador continued to hope for a solution, such as a total arbitration by the President of the United States, which would consider extra-legal arguments.

²⁹ Signed at Rio de Janeiro, Jan. 29, 1942, 56 Stat. 1818, E.A.S. No. 288, 3 BEVANS 700, 36 AJIL Supp. 168 (1942).

³⁰ INTER-AMERICAN AFFAIRS: 1942, AN ANNUAL SURVEY 15-16 (A. P. Whitaker ed. 1943); J. LLOYD MECHAM, *THE UNITED STATES AND INTER-AMERICAN SECURITY 1889-1960*, at 169-70 (1961); A. SOLF Y MUÑOZ, *MEMORIA DEL MINISTRO DE RELACIONES EXTERIORES, Julio 1941 a Julio 1942*, at LVI-LIX (1943).

³¹ Since 1942, Ecuadorian politicians have occasionally criticized or even denounced the terms of the Rio Protocol. In response to one such outburst, the four countries guaranteeing the Rio Protocol sent telegrams to the Governments of Peru and Ecuador on December 7, 1960, expressing their mutual agreement that a basic principle of international law was that a unilateral determination on the part of one of the parties to a treaty of limits is not enough to invalidate the treaty nor will it free the state from the obligations of the treaty. They concluded that both parties must agree to a change before the stipulations of a treaty can be modified or before an international tribunal can be given the power to consider the case. Maier, *supra* note 1, at 45-46.

unilaterally void a treaty of limits, the Ecuadorian Government is challenging a rule of international law the overthrow of which would threaten chaos for the entire region, given the large number of boundary treaties signed in Latin America since independence.

RONALD BRUCE ST JOHN

CORRESPONDENCE

TO THE EDITOR-IN-CHIEF

December 11, 1976

Professor Lissitzyn in his review of my book *Jurisdiction over Crimes on Board Aircraft* in this *Journal*, (70 AJIL 601-02 (1976)) faults me on three grounds. First, he maintains that my interpretation of Article 3 of the Tokyo Convention is unconvincing. He states that "particularly unconvincing [is the author's] position that Article 3 of the Convention excludes all jurisdictions other than that of the state of registration of the aircraft (with a qualified exception of the jurisdiction of the subjacent state under Article 4) doing away even with such a universally accepted basis of jurisdiction as the nationality of the alleged offender" (p. 601). While this author has raised the possibility of interpreting the provision without excluding the latter jurisdiction (p. 64), he preferred the interpretation cited by the learned reviewer because he considers it more in line with the objective and purpose of the Convention, viz. the unification of rules on jurisdiction. The latter is well explained on pp. 19-24 of the work. In this interpretation, the author relied on Article 31(1) of the Vienna Convention on the Law of Treaties (1969), Lord McNair and Sir Gerald Fitzmaurice (pp. 62-63), as well as the *travaux préparatoires*. The author maintains that the Tokyo Convention is intended to create a new regime of jurisdiction over crimes on board aircraft and the statement of the U.S. representative at the meeting of the ICAO Legal Committee 1962 is particularly relevant (quoted by author, pp. 22 and 60) but the following statement may be cited "... The principal purpose of Article 3(1) ... had been to provide international recognition for the extraterritorial exercise of jurisdiction by one State over an event that might occur in the airspace of another. This was not a commonly accepted principle of international law."

Secondly, the learned reviewer states that the author's "statement that a signatory to the Tokyo Convention had the right to object to the admission of new parties to the Convention (p. 312) is justified neither by any provision in the Convention nor by anything in the law of treaties" (pp. 601-02). In putting forward the proposition concerning the right of signatory states prior to ratification, to object to reservations or the admission of new parties, the author relied on the Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951) and the statement of Sir Gerald Fitzmaurice, the Special Rapporteur, in his Report on the Law of Treaties (1956) (pp. 311-12). The International Court said:

... [Signature] establishes a provisional status in favour of that State [which has signed]. ... This status would justify more favourable treatment being meted out to signatory States in respect of objections [to reservations] than to States which have neither signed nor acceded. ... Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character ([1951] ICJ REP. 28.

On the other hand, Sir Gerald Fitzmaurice said:

... while a merely "concluding" signature can confer no substantive rights under the treaty, it may confer certain rights in connexion with it. ... Certainly sig-

nature confers a status, and with it the rights inherent in that status. The whole balance of a treaty is capable of being altered after signature by the admission of reservations, or of other acceding parties, so that a signatory State may find that the treaty it has signed . . . is, in effect, no longer the same treaty. ([1956] 2 Y.B. INT. L. COMM. 122, para. 59.)

The absence of any indication in the review to the author's basis may distort the picture and can only mislead the reader.

Thirdly, the learned reviewer maintains that the author's ". . . view (pp. 324, 325) that a state would automatically cease to be a party to the Convention if it ceased to be a member of the United Nations and of any specialized agency because only a member of one of these organizations may become a party to the Convention is highly questionable" (p. 602). The author's interpretation is based on the *travaux préparatoires* of the Tokyo Convention and the circumstances prevailing at the Tokyo Conference of 1963. The origin of the final clauses of the Tokyo Convention is the final clauses of the Guadalajara Convention (1961), Supplementary to the Warsaw Convention 1929 (see International Conference, Tokyo, Vol. II, ICAO Doc. 8565-LC/152-2, Doc. No. 4, at 21) which contained, at first, the "all States clause" but were amended to limit partnership in the Convention to members of the United Nations and those of the specialized agencies, on the basis of a U.S. proposal (see International Conference on Private Air Law, Guadalajara (1961), ICAO Doc. 8301-LC/149-1, at 225-228 and 8301-LC/149-2, at 51). Moreover, statements made at the Tokyo Conference by some of the participants from both the Western and Socialist states, *e.g.*, those of the delegations of the Federal Republic of Germany, the United States and the USSR, together with the fact that the invitation to attend the Tokyo Conference was limited to members of the United Nations and the specialized agencies, would seem to provide some basis, in the author's opinion, for his interpretation in this respect (see pp. 300-02 of the work and Tokyo Conference, ICAO Doc. 8565-LC/152-1, at 7-9 and 353-55). Furthermore, the author used a cautious terminology such as "it is possible to argue," "it is feasible to maintain" and "the question is not crystal clear under the Convention" (p. 323), which the reviewer might perhaps have failed to notice. Again, the absence of any reference to this page could convey a wrong impression even to the careful reader.

Finally, I would like to state that the book is the edited and updated thesis accepted for the degree of Doctor of Philosophy at Cambridge University. It had been supervised by Professor R. Y. Jennings and was examined by Mr. John Collier and Professor David Johnson.

SAMI SHUBBER

Professor Lissitzyn responds:

Below is my reply to the three points in Dr. Shubber's letter:

First, the objective and purpose of a treaty are certainly relevant to its interpretation, but the Tokyo Convention contains no statement of its objective and purpose. They are inferred by Dr. Shubber mainly from some passages in the records of the Legal Committee of ICAO whose work laid the foundation for the Tokyo Conference. These inferences should not be allowed to render meaningless a specific provision of the Convention, Article 3(3) quoted in full in my review, which explicitly preserves "any criminal jurisdiction exercised in accordance with national law."

Perusal of the preparatory work in its entirety reaffirms my opinion that Dr. Shubber's effort to interpret away Article 3(3) is unconvincing. His interpretation is inconsistent with that of Boyle and Pulsifer in the article I cited in my review (and well known to Dr. Shubber) who say that the language of this paragraph as drafted by the Legal Committee "was further expanded [at the Conference] to make it clear that any form of criminal jurisdiction exercised by a State under its national law would still be available . . ." (30 J. OF AIR L. & COMMERCE 305, 336 (1964)). As I pointed out, Mr. Boyle was the head of the U.S. delegation at the Tokyo Conference. Another member of this delegation, Allan I. Mendelsohn, also strongly stresses this purpose of Article 3(3) (A. Mendelsohn, *In-Flight Crime: The International and Domestic Picture under the Tokyo Convention*, 53 VA. L. REV. 509, 517-18 (1967)). Mendelsohn's article is cited by Dr. Shubber (at p. 72 of his book), as is that of Miss G. M. E. White (*id.*) who also disagrees with Dr. Shubber's interpretation. Furthermore, as I pointed out in my review, Dr. Shubber's interpretation is inconsistent with the practical construction of the Convention by at least one party thereto, the United States, which in the 1970 Act of Congress entitled: "An Act to Implement the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, and for Other Purposes" (P.L. 91-449, 84 Stat. 921, 49 U.S.C. §1472(i-k) (1970 ed.)) asserts criminal jurisdiction on the basis, *inter alia*, of the place of first landing of the aircraft (with qualifications). (Cf. my editorial comment in 67 AJIL 306, 310 (1973).) That this assertion of jurisdiction was deliberate and emerged after full consideration of the issue appears from the already cited article of Mendelsohn (at 548-58) who, as an attorney in the Office of the Legal Adviser, U.S. Department of State, contributed to the drafting of the legislation eventually enacted in 1970. It is generally recognized that practical construction by the parties may be used in the interpretation of treaties.

Second, in objecting to my criticism of his assertion that a "signatory to the Tokyo Convention had the right to object to the admission of new parties to the Convention," Dr. Shubber wastes time and space by discussing objections to *reservations*, which were not even mentioned in my review, and quotes a statement of Sir Gerald Fitzmaurice concerning accessions as well as reservations which, with respect to accessions, is clearly inapplicable to a treaty which contains a clause expressly permitting accession by nonsignatories, as does the Tokyo Convention (Art. 22), since accession by a state pursuant to such a clause cannot be regarded as modifying the treaty without a signatory's consent. By signing the treaty, a state consents in advance to accession by any qualified state. This simple consideration seems to have escaped Dr. Shubber's attention, although he devotes several pages of the book (317 *et seq.*) to discussing the accession clause in the Convention.

Third, in questioning Dr. Shubber's view that a state automatically ceases to be a party to the Convention if it ceases to be a member of the United Nations and of any specialized agency, I did not overlook the cautious language on p. 323 of his book which he quotes in his letter. The chapter in which he discusses this matter ends, however, with this unequivocal sentence (at 325): "Therefore, any State which ceases to be a member of any of the said organizations, ceases, immediately, to be a party to the Tokyo Convention." I still regard this view as highly questionable. A provision limiting the right to sign or accede to a convention to states members of certain organizations, and the discussion of this provision in the

course of preparatory work, do not necessarily imply that a state which has become a party to the convention ceases automatically to be such if it ceases to be a member of any of these organizations. The Tokyo Convention contains a denunciation clause (Art. 23) of the usual type which does not reflect Dr. Shubber's view (*cf.* also Art. 26), but does not contain any clause concerning expulsion or automatic exclusion from the Convention of any party. Dr. Shubber, furthermore, is unable to cite any state practice or provision in the Vienna Convention on the Law of Treaties to support his position. *Cf.* Articles 54 and 55 of the Vienna Convention which, though not directly applicable, rather point in the opposite direction.

TO THE EDITOR-IN-CHIEF,

You were kind enough to pay attention in your widely known *Journal* to my book *Zastrzeżenia do traktatów wielostronnych* ["Reservations to Multilateral Treaties"]. I refer to the book note by Professor Kazimierz Grzybowski which appeared in 70 AJIL 616-17 (1976). I admit that it is a somewhat unusual step on the part of an author of a book to comment upon a review. And if I do so, it is because something more than my personal dissatisfaction is involved in the whole issue.

In my opinion, even if one chooses to present citations concerning third class problems only—as is the case with the review under consideration—at least these citations should correspond to the real text of a book. There are three quotations from my book with the respective pages indicated and to my regret not one meets this requirement.

The review says: "The author states four reasons for the innovations in the Treaty on Treaties as regards reservations, among them structural changes in the international community (the theory of the three camps) (p. 68)." In fact neither in the text nor in the context of "four reasons" given on p. 68 is an allusion made to the Treaty on Treaties. The exact translation of the whole statement in question is as follows:

B . . . UN period.

During the UN period reservations grew (and continue to grow) in number in a geometrical progression. This growth is an outcome of the following facts:

—

—differentiation of the international community: existence of socialist states, capitalist states and the so-called Third World states, representing very often different group interests.

—

The review goes on: "However, in describing various tendencies among the participants in the Vienna Conference which drafted the text of the Convention, she discovers that the proponents of the new rules included the United States, most of the Latin American states, socialist states, and some others, a somewhat puzzling statement in view of the earlier findings (p. 143)." In fact on p. 143 no allusion in any form whatsoever is made either to the Vienna Conference or to the Treaty on Treaties. It is clear from the text as well as from the context that all references to the positions of states appearing on this page deal with the General Assembly debates on reservations to the Genocide Convention in 1950-1952. Having indicated which countries defended the idea of unanimity in respect of reservations to this Convention, I stated (p. 143): "Almost all countries from the American continent (including the USA), socialist states (except



Yugoslavia) and certain others advocated in the General Assembly a more liberal solution." Of course, the Vienna Conference and the Vienna Convention itself, are analyzed in my book but on different pages and in a different way.

The review says: "Furthermore, she points out that, although the Soviet delegation considered the ICJ's Opinion in the *Reservations to the Genocide Convention* case an improper involvement of the Court in matters which were outside its jurisdiction, the Polish delegation considered it an important element in the development of new rules of international law (p. 166)." In fact, having presented a concept of nonacceptance of reservations defended by socialist states in the General Assembly during the debates on reservations to the Genocide Convention, my book says the following on the views expressed in 1951 (p. 166): "It is interesting in this context that while the USSR delegate recognized the ICJ Advisory Opinion as inadequate, the delegate of Poland supported it, adding that broader consequences should be drawn from it." This is an exact translation of the whole statement in question. A comparison of these two texts discloses the significant differences, and I am something less than grateful to the reviewer for supplementing ideas presented as mine.

Whatever are the reasons behind such a treatment of the book by the reviewer, this very fact provides me with an opportunity to say something in connection with the alleged "little significance" of the book and "somewhat conventional and purely legalistic approach" although, I admit, it is an even more unusual step on the part of the author of a book. I regret very much that looking for my "ritual genuflections at the shrine of the dogma of the progressive role of the socialist camp in the development of international law" (an excerpt from the review) has prevented Professor Grzybowski from seeing and recording the fact that the materials analyzed in the book include, *inter alia*, an outcome of my macro-scale (global) study of state practice (reservations, objections, withdrawals of reservations, reservation clauses) based on: Martens' *Recueil*, the LNTS, Hudson's *International Legislation*, the UNTS (710 volumes), and UN Doc.ST/LEG/SER.D/5. Conclusions drawn from this reexamination of state practice, often unexpected and unique in many respects, are present in all relevant paragraphs of the book (figures, classifications, typical/exceptional practices, etc.). This one could hardly find in any previous book on the subject.

RENATA SZAFARZ
University of Warsaw, Poland

Professor Grzybowski responds:

I am somewhat puzzled by Dr. Szafarz' complaint concerning page references. I have not quoted from the book, and page references are to passages and subsections which deal with matters reported in the review. Dr. Szafarz does not dispute the correctness of my summations of her argument which must per force be somewhat generalized in view of the limited space. Our other differences of opinion are the result of distance and perspective.

I am quite sure two or three books later Dr. Szafarz will see her work as not quite as perfect as it seems to her today and will perhaps realize that a reviewer for a foreign audience must meet broader criteria. I am quite sure that her dissertation is a contribution to Polish study of international law. It is not in the international context for the public which does

not read Polish. It would be enough to compare Dr. Szafarz' bibliography with the bibliography in T. O. Elias's *The Modern Law of Treaties* which appeared the same year as Dr. Szafarz' study. Apparently, she did not have access to the broad range of publications which came out since the Vienna Convention was adopted. There is nothing in Dr. Szafarz' book which cannot be found elsewhere. The only exception is the historical treatment which is a contribution (as stated in the review) and deserves attention even from those who do not read Polish.

By the same token I have refrained from reviewing the language and the style of her book although it is far below the standards of Polish jurisprudence.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

Eleanor C. McDowell *

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

DIPLOMATIC RELATIONS AND RECOGNITION

Recognition of States (U.S. *Digest*, Ch.2, §3)

The Department of State supplied to the press on November 1, 1976, a statement of the criteria applied by the United States in deciding whether or not to recognize a new state. The statement follows:

In the view of the United States, international law does not require a state to recognize another entity as a state; it is a matter for the judgment of each state whether an entity merits recognition as a state. In reaching this judgment, the United States has traditionally looked to the establishment of certain facts. These facts include effective control over a clearly-defined territory and population; an organized governmental administration of that territory; and a capacity to act effectively to conduct foreign relations and to fulfill international obligations. The United States has also taken into account whether the entity in question has attracted the recognition of the international community of states.¹

JURISDICTION BASED ON AGREEMENT WITH THE TERRITORIAL STATE

Bilateral Agreements (U.S. *Digest*, Ch.6, §3)

The United States and Mexico, on November 25, 1976, signed a Treaty on the Execution of Penal Sentences.¹ It was the first treaty of its kind for both countries. Under it U.S. nationals sentenced in Mexico and Mexican nationals sentenced in the United States may elect to serve their sentences in their own country, with the concurrence of the two nations' authorities. In determining whether a transfer should be requested, the treaty provides that account may be taken of *inter alia*: the type and seriousness of the crime for which the prisoner was sentenced; his previous criminal record, if any; the strength of his connections by residence, family relations, and otherwise to the social life of the country where he is imprisoned or with his native country.

* Office of the Legal Adviser, Department of State.

¹ Notice posted in Dept. of State Press Relations Office on Nov. 1, 1976, in response to a question raised in a news briefing of Oct. 22, 1976.

¹ For the text of the treaty, see *Official Documents* section, *infra* p. 393; 15 ILM 1343 (1976). See also 75 DEPT. STATE BULL. 750 (1976).

The transfer of a prisoner would require the initiation of the request by the state in which the sentence has been imposed and the approval of the request by the other state. No transfer would take place without the consent of the offender.

The treaty is subject to ratification by both countries. The Government of Mexico made clear in the negotiations that ratification by Mexico is also subject to the approval by the majority of the state legislatures of an amendment to Article 18 of the Constitution proposed by the Federal Executive Authority on September 4, 1976, and favorably approved by the Congress of the Union. In the United States, ratification with the advice and consent of two-thirds of the Senate and enabling legislation are required.

SOVEREIGN IMMUNITY

Foreign Sovereign Immunities Act (U.S. Digest, Ch.6, §7)

The Foreign Sovereign Immunities Act of 1976 was signed into law on October 21, 1976, to take effect on January 19, 1977.¹ The purpose of the Act is to provide a firm basis for determining when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and when a foreign state is entitled to sovereign immunity.

The bill H.R. 11315 was introduced in the 94th Congress on the basis of a draft recommended jointly by the Departments of State and Justice and submitted to the Congress on October 31, 1975,² revising an earlier draft submitted in 1973.³ The reports of the Senate and House Committees on the Judiciary summarized the need for the legislation, as well as its objectives and background, as follows:

... American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes. Instances of such contact occur when U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.

At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state. Unlike other legal systems, U.S. law does not afford plaintiffs and their counsel with a means to commence a suit that is specifically addressed to foreign state de-

P.L. 94-583; 90 Stat. 2891; 28 U.S.C. 1330, 1332, 1602-1611, 1391, 1441; 15 ILM 13-8 (1976).

- 70 AJIL 313 (1976); 15 ILM 90 (1976). See also 1975 U.S. DIGEST 347-68.

- S.566, H.R. 3493, 93d Cong., 1st Sess. (1973); 12 ILM 118 (1973).

fendants. It does not provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity; and, in the event a plaintiff should obtain a final judgment against a foreign state or one of its trading companies, our law does not provide the plaintiff with any means to obtain satisfaction of that judgment through execution against ordinary commercial assets.

In a modern world where foreign state enterprises are every day participants in commercial activities, H.R. 11315 is urgently needed legislation. The bill . . . would accomplish four objectives:

First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

Second, the bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. At present, this is not always the case. Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. . . . U.S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

Third, this bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state. This would render unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction.

Fourth, the bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. H.R. 11315 seeks to restrict this broad immunity from execution. It would conform the execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.

BACKGROUND

Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state. It differs from diplomatic immunity (which is drawn into issue when an individual diplomat is sued). H.R. 11315 deals solely with sovereign immunity.

Sovereign immunity as a doctrine of international law was first recognized in our courts in the landmark case of *The Schooner Exchange v. M'Faddon*, 7 Cranch 116 (1812). There, Chief Justice Marshall upheld a plea of immunity, supported by an executive branch suggestion, by noting that a recognition of immunity was supported by the law and practice of nations. In the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department. This trend reached its culmination in *Ex Parte Peru*, 318 U.S. 578 (1943), and *Mexico v. Hoffman*, 324 U.S. 30 (1945).

Partly in response to these decisions and partly in response to developments in international law, the Department of State adopted the restrictive principle of sovereign immunity in its "Tate Letter" of 1952, 26 Department of State Bulletin 984. Thus, under the Tate letter, the Department undertook, in future sovereign immunity determinations, to recognize immunity in cases based on a foreign state's public acts, but not in cases based on commercial or private acts. The Tate letter, however, has posed a number of difficulties. From a legal standpoint, if the Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

From a foreign relations standpoint, the initiative is left to the foreign state. The foreign state chooses which sovereign immunity determinations it will leave to the courts, and which it will take to the State Department. The foreign state also decides when it will attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria.

From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.

THE UNITED STATES IN FOREIGN COURTS

Since World War II, the United States has increasingly become involved in litigation in foreign courts. This litigation has involved such diverse activities as the purchase of goods and services by our embassies, employment of local personnel by our military bases, the construction or lease of buildings for our foreign missions, and traffic accidents involving U.S. Government-owned vehicles.

In the mid-1950's, when the United States first became involved in foreign suits on a large scale, foreign counsel retained by the De-

partment of Justice were instructed to plead sovereign immunity in almost every instance. However, the executive branch learned that almost every country in Western Europe followed the restrictive principle of sovereign immunity and the Government's pleas of immunity were routinely denied in tort and contract cases where the necessary contacts with the forum were present. Thus, in the 1960's, it became the practice of the Department of Justice to avoid claiming immunity when the United States was sued in countries that had adopted the restrictive principle of immunity, but to invoke immunity in those remaining countries that still held to the absolute immunity doctrine. Beginning in the early 1970's, it became the consistent practice of the Department of Justice not to plead sovereign immunity abroad in instances where, under the Tate letter standards, the Department would not recognize a foreign state's immunity in this country.

In virtually every country, the United States has found that sovereign immunity is a question of international law to be determined by the courts. The United States cannot take recourse to a foreign affairs agency abroad as other states have done in this country when they seek a suggestion of immunity from the Department of State.

CONCLUSION

On the basis of the facts outlined in the executive communication⁴ and the testimony at the hearings on the bill, the committee finds that there is a clearly defined need for the enactment of these provisions into law.⁵

The Department of State issued a notice on November 10, 1976, of its policy with respect to the immunity of foreign states in U.S. courts, in light of the Foreign Sovereign Immunities Act. The notice sets forth a letter of November 2, 1976, to the Attorney General from Monroe Leigh, Legal Adviser of the Department, which states how the Department proposes to treat questions of foreign state immunity, both before and after the effective date of the Act. The text of the letter follows:

DEAR MR. ATTORNEY GENERAL: Since the Tate Letter of 1952, 26 Dept. State Bull. 984, my predecessors and I have endeavored to keep your Department apprised of Department of State policy and practice with respect to the sovereign immunity of foreign states from the jurisdiction of United States courts. On October 21, 1976, the President signed into law the Foreign Sovereign Immunities Act of 1976, P.L. 94-583. This legislation, which was drafted by both of our Departments, has as one of its objectives the elimination of the State Department's current responsibility in making sovereign immunity de-

⁴ Dated Oct. 31, 1975. See 15 ILM 88 (1976); 1975 U.S. DIGEST 346.

⁵ S. REP. 94-1310 and H.R. REP. 94-1487, 94th Cong., 2d Sess. (1976). 15 ILM 1398 (1976). The reports supply a section-by-section analysis of the bill as favorably reported. For the substance of that analysis, see 15 ILM 102 (1976); 1975 U. S. DIGEST 353-68. The Subcommittee on Administrative Law and Government Relations, House Committee on the Judiciary, held hearings on H.R. 11315, at which representatives of the Department of State and the Department of Justice testified. For excerpts from the testimony of Monroe Leigh, Legal Adviser of the Dept of State, and Bruno Ristau, Chief, Foreign Litigation Section, Civil Division, Dept. of Justice, see 70 AJIL 817 (1976).

terminations. In accordance with the practice in most other countries, the statute places the responsibility for deciding sovereign immunity issues exclusively with the courts.

P.L. 94-583 is to go into effect 90 days from the date it was approved by the President, or on January 19, 1977. We wish to advise you of how the Department of State proposes to treat sovereign immunity requests prior to January 19, 1977, and what the Department of State's interests will be after that date.

Immunity from suit. Until January 19, 1977, the Department of State will apply the Tate Letter, in the event that it makes any determination with respect to a foreign government's immunity from suit. It should be noted that P.L. 94-583 embodies in many respects the practice under the Tate Letter.

Immunity from attachment. Until January 19, 1977, the Department will continue to give prompt attention to diplomatic requests from foreign states, for recognition of immunity of foreign government property from attachment. The Department of State's policy until now has been to recognize an immunity of all foreign government property from attachment—unless (1) the property in question is devoted to a commercial or private use; (2) the underlying lawsuit is based on a commercial or private activity of the foreign state; and (3) the purpose of the attachment is to commence a lawsuit and not to assure satisfaction of a final judgment.

The Department does not contemplate changing this policy before P.L. 94-583 takes effect. We have noted that until P.L. 94-583 takes effect, it may be difficult for a private litigant to commence a suit against a foreign state or its entities. Also, since P.L. 94-583 will not have any effect whatsoever on the running of the statute of limitations, a continuation of existing policy on attachment until January 19, 1977 might be the only way a claim for relief could be preserved.

P.L. 94-583 will make two important and related changes in the Department's sovereign immunity practice with respect to attachment. First, the statute will prescribe a means for commencing a suit against a foreign state and its entities by service of a summons and complaint, thus making jurisdictional attachments of foreign government property unnecessary.

Second, Section 1609 of the statute will provide an absolute immunity of foreign government property from jurisdictional attachment. Such jurisdictional attachments have given rise to diplomatic irritants in the past and, in recent years, have been the principal impetus for a Department of State role in sovereign immunity determinations. It appears that after January 19, 1977, any jurisdictional attachment of foreign government property could, under Section 1609 of P.L. 94-583, be promptly vacated upon motion to the appropriate court by the foreign state defendant.

Immunity from execution. The Department of State has in the past recognized an absolute immunity of foreign government property from execution to satisfy a final judgment. The Department does not contemplate changing this policy in the period before January 19, 1977. On or after that date, execution may be obtained against foreign government property only upon court order and in conformity with the other requirements of Section 1610 of P.L. 94-583.

Future Department of State interests. The Department of State will not make any sovereign immunity determinations after the effective date of P.L. 94-583. Indeed, it would be inconsistent with the legislative intent of that Act for the Executive Branch to file any suggestion of immunity on or after January 19, 1977.

After P.L. 94-583 takes effect, the Executive Branch will, of course, play the same role in sovereign immunity cases that it does in other types of litigation—e.g., appearing as *amicus curiae* in cases of significant interest to the Government. Judicial construction of the new statute will be of general interest to the Department of State, since the statute, like the Tate Letter, endeavors to incorporate international law on sovereign immunity into domestic United States law and practice. If a court should misconstrue the new statute, the United States may well have an interest in making its views on the legal issues known to an appellate court.

Finally, we wish to express appreciation for the continuous advice and support which your Department has provided during the ten years of work and consultation that led to the enactment of P.L. 94-583. We believe that the new statute will be a significant step in the growth of international order under law, to which the United States has always been committed.⁶

COASTAL STATE ECONOMIC JURISDICTION

Maritime Jurisdiction (US Digest, Ch.7, §3)

U.S.-Canada Maritime Boundaries: On November 4, 1976, the Department of State published in the *Federal Register* the coordinates of the boundaries of the continental shelf and fisheries jurisdiction asserted by the United States in the areas off the coasts of the United States and Canada. The publication was made in view of the publication by Canada on November 1, 1976, of an order giving the 60-day advance notice required by Canadian law of the 200-mile fisheries zones it intended to implement on January 1, 1977.¹ The Canadian order sets out the lateral limits of the zones asserted by Canada in the Atlantic and Pacific Oceans, including areas off the coasts of the United States.

The notices were issued while maritime boundary and related resource questions continued under discussion between the two countries, without agreement having been reached on continental shelf or fisheries zone boundaries. In a number of areas, the asserted coordinates are different. Each notice makes clear that the assertions of jurisdiction are without prejudice to the negotiation of any maritime boundary between the two countries.

The U.S. notice, dated November 1, 1976, and issued by Monroe Leigh, Legal Adviser of the Department of State, stated, in part:

The Fishery Conservation and Management Act of 1976 (Pub. L. 94-265) establishes a fishery conservation zone contiguous to the territorial sea of the United States, effective March 1, 1977, the outer boundary of which is a line drawn in such a manner that each point

⁶ 41 Fed. Reg. 50,883 (1976); 15 ILM 1437 (1976).

¹ 15 ILM 1372 (1976).

on it is 200 nautical miles from the baseline from which the territorial sea is measured.

The United States exercises sovereign rights, in accordance with international law, over the continental shelf appertaining to the United States for the purpose of exploring it and exploiting its natural resources.

The Government of the United States of America has been, is, and will be engaged in consultations and negotiations with the governments of neighboring countries concerning the delimitation of areas subject to the respective jurisdiction of the United States and of these countries.

The Government of the United States of America intends in due course to determine and publish the limits of the entire fishery conservation zone off its coast.

The Government of Canada, on November 1, 1976, announced in an Order-in-Council the extent of the fishery zone to be asserted by Canada which will become effective on January 1, 1977.

The United States and Canada have not agreed on maritime boundaries and the United States does not accept all of the coordinates published by Canada on November 1.

Therefore, in order to protect the rights of the United States and those of its nationals, the Department of State, on behalf of the Government of the United States of America, hereby announces the lateral limits, in certain maritime areas off the coasts of the United States adjacent to areas off the coasts of Canada, within which the United States will exercise its fishery management authority and its sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources in accordance with international law.

The limits of the maritime jurisdiction of the United States as set forth below are intended to be without prejudice to any negotiations with Canada or to any positions which may have been or may be adopted respecting the limits of maritime jurisdiction in such areas.²

The limits specified are in four areas: U.S.-Canada Gulf of Maine 1 and 2, U.S.-Canada Juan de Fuca 2, U.S.-Canada Dixon Entrance 2, and U.S.-Canada Beaufort Sea 2.

U.S.-Mexico Maritime Boundaries: The United States and Mexico, on November 24, 1976, exchanged notes on provisional maritime boundaries.¹

² 41 Fed. Reg. 48,619 (1976); 15 ILM 1435 (1976). See also 75 DEPT. STATE BULL. 667 (1976). The following footnotes are appended to the Department's notice:

1. In view of the fact that the claimed boundaries published by the United States and Canada would leave an unclaimed area within the Gulf of Maine, the United States will exercise its fisheries management jurisdiction to the Canadian-claimed line where that line is situated eastward of the United States-claimed line, until such time as a permanent maritime boundary with Canada is established in the Gulf of Maine.

2. Where the continental shelf extends beyond 200 miles the claimed continental shelf boundary of the United States will extend to the seaward limit of the continental shelf in accordance with international law and in a direction determined by application of the principles by which the described boundary segment is determined.

Entered into force Nov. 24, 1976.

The boundaries were intended to be utilized until certain technical work could be completed, and pending the coming into force of a maritime boundary treaty in accordance with the constitutional processes of both countries. The provisional boundaries are in the Pacific Ocean, the Western Gulf of Mexico, and the Eastern Gulf of Mexico. They extend to 200 nautical miles seaward from the baselines used to measure the breadth of the Territorial Sea. Their establishment was made necessary by the U.S. Fishery Conservation and Management Act of 1976,² establishing a Fishery Conservation Zone off the coast of the United States, and the Mexican Decree adding Article 27 of the Political Constitution of Mexico to establish an Exclusive Economic Zone of Mexico outside the Territorial Sea.³ The notes were exchanged simultaneously with signature of the U.S.-Mexican fishery agreement establishing principles and procedures for fishing by U.S. vessels within 200 miles of Mexico.⁴

The Mexican note (in English translation), to which the U.S. note expressed agreement, stated, in part:

It would be understood between the two Governments that on the north side of such lines Mexico would not, and on the south side of such lines the United States would not, for any purpose, claim or exercise sovereign rights or jurisdiction over the waters or seabed and subsoil. It would be further understood that such lines would not affect or prejudice in any manner the positions of either government with respect to the extent of internal waters, of the Territorial Sea, of the High Seas or of sovereign rights or jurisdiction for any other purpose.

THE DEEP SEABED AND THE HIGH SEAS

Boarding and Search on High Seas (U.S. Digest, Ch.7, §5)

On October 19, 1976, the U.S. Coast Guard boarded and seized in international waters a Panamanian flag vessel reportedly engaged in narcotic smuggling. The seizure was made with the consent of the Panamanian Government. The predominantly Colombian crew was subsequently returned to Panama for prosecution by the Panamanian authorities for violation of Panamanian law prohibiting trafficking in contraband narcotics aboard a vessel of Panamanian registry. Kempton B. Jenkins, Acting Assistant Secretary of State for Congressional Relations, described the incident in a letter of December 6, 1976, to Senator Edmund S. Muskie, as follows:

The vessel in question, the *Don Emilio* of Panamanian registry, was reported to be carrying a cargo of illicit drugs which were allegedly taken on board during the vessel's call to the port of Cartagena, Colombia. Following its departure from Colombia, the vessel set a northeastward course and remained in international waters. According to information obtained from reliable informants, the contraband cargo was destined for the United States and Canada where it was to be picked up by intercept craft. The United States Coast Guard

² 90 Stat. 331; 16 U.S.C. 1801 *et seq.*; 70 AJIL 624 (1976); 15 ILM 635 (1976).

³ 15 ILM 380 (1976).

⁴ See 75 DEPT. STATE BULL. 758 (1976).

picked up and maintained surveillance of the vessel; however, the captain of the vessel apparently became aware of the surveillance and decided not to enter U.S. waters. The Coast Guard requested authority to board the vessel in international waters. The Department of State contacted the Government of Panama to obtain its consent to board the vessel, citing the obligation to cooperate in the prevention of illicit narcotic trafficking imposed under the Single Convention on Narcotic Drugs, 1961, as amended¹ to which both countries are parties.

The Government of Panama consented to our request and authorized the Coast Guard to act as its agent to board the vessel and seize the illicit drugs. The vessel was boarded pursuant to this authority and a contraband cargo discovered. Prior to the boarding, the vessel appeared to be in some distress and upon boarding it, it was discovered that contaminated fuel had disabled the vessel. The Coast Guard towed the vessel to the Port of Miami, Florida, where the vessel was held for search by agents of the Drug Enforcement Administration. Approximately 35 tons of marijuana was found, removed from the vessel by the Drug Enforcement Administration and destroyed. A thorough investigation failed to produce sufficient evidence of violation of U.S. narcotic laws, particularly the conspiracy provisions, to warrant United States prosecution.

The Governments of Colombia and Panama were advised of the facts of the case and requested to indicate their respective interests in prosecuting those involved in this case. The crew of the vessel was predominantly Colombian and the contraband was alleged to have been loaded in Colombia. The Colombian Government expressed no desire to prosecute members of the crew for a violation of Colombian law; however, the Panamanian Government requested extradition of the crew to stand trial in Panama for the violation of Panamanian law. The crew has been returned to Panama where the Department understands criminal proceedings have been instituted.²

The Department of State informed the Embassy of Panama in Washington, by note dated December 13, 1976, that, pursuant to Article IX of the U.S.-Panama Treaty of Extradition of May 25, 1904,³ the United States was offering and agreeing to release the vessel *Don Emilio* to the Government of Panama, with the understanding that the vessel would be removed from its berth at the U.S. Coast Guard Station, Miami, Florida, no later than the following day.

SUBSTANTIVE BASES FOR INTERNATIONAL CLAIMS

Noncombat Activities of Armed Forces (U.S. Digest, Ch.9, §2)

Public Law 94-390 (90 Stat. 1191), approved August 19, 1976, amended 10 U.S.C. §2734a(a) and §2734b(a) to provide for settlement under international agreements of certain claims incident to the noncombat activities

¹ TIAS No. 6298; 18 UST 1407.

² Dept. of State File Nos. P76 0185-1943 and P76 0191-1209.

³ TS 445; 34 Stat. 2851; 10 BEVANS 673.

of the armed forces. The purpose of the legislation was to make the language of those sections consistent with the provisions of the NATO status of forces type agreements entered into by the United States with other countries to provide for reimbursement or payment for claims which are settled or adjudicated under those agreements.

Under the agreements, the receiving state investigates, settles, adjudicates, and makes final awards direct to third-party claimants in two categories of cases: where the claim arises out of (1) acts or omissions of members of a force or a civilian component of the sending state done in the performance of official duty; and (2) other acts, omissions, or occurrences for which a force or civilian component is otherwise legally responsible under local law. The agreements require that reimbursement be made in both situations by the sending state on a pro rata basis, usually 75 percent of the amount of the claim allowed by the receiving state.

The amendment to 10 U.S.C. §2734a(a) provides fully for reimbursement or payment to foreign governments in the "otherwise legally responsible" category mentioned above. It removes a possible ambiguity as to the method of settlement of claims, which under the agreements can be adjudicated by a foreign country under its laws and regulations, including settlement by administrative action. It also clearly provides for payment in cases of settlement by arbitration, a method provided for in the status of forces agreements unless the contracting parties agree otherwise.

For the purpose of consistency, the legislation makes a corollary amendment in §2734b which relates to the payment or reimbursement to the United States for claims arising in the United States resulting from property loss, personal injury, or death as the result of the acts or omissions of a civilian employee or member of an armed force of a foreign country.¹

ECONOMIC SANCTIONS

Foreign Boycotts (U.S. Digest, Ch.10, §12)

The antiboycott provisions (known as the Ribicoff Amendment) of the Tax Reform Act of 1976,¹ approved by President Ford on October 4, 1976, deny certain tax benefits to taxpayers who "participate in or cooperate with" an international boycott in certain ways. Foreign source income attributable to boycott-related activity loses the tax benefits of the foreign tax credit, Domestic International Sales Corporations (DISC), and the deferral of U.S. tax on foreign source income. The Act required the Secretary of the Treasury to publish within 30 days after signature of the Act a list of countries which "require or may require" participation in or cooperation with an international boycott.

¹ See also H.R. REP. No. 94-543; S. REP. 94-1121, 94 Cong., 2d Sess. (1976).

¹ See Title X (changes in the Treatment of Foreign Income), §§1061-1067, of P.L. 94-455 (90 Stat. 1520); H.R. REP. 94-658 and 94-1515; S. REP. 94-938 and 94-938, Pt. 2, and 94-1236; 94th Cong., 2d Sess. (1976).

A taxpayer is required to file with the Secretary of the Treasury reports with respect to, among other things:

- (a) its operations in the listed countries and any other in which the taxpayer knows or has reason to know that "participation in or cooperation with" an international boycott is required as a condition of doing business within such country or with the government, a company, or a national of such country;
- (b) any participation in or cooperation by it with an international boycott;
- (c) requests which it has received to participate in or cooperate with a boycott.

Under the Act a taxpayer is deemed to have participated in or cooperated with an international boycott if, as a condition of doing business directly or indirectly within a country or with the government, a company, or a national of a country, it agrees, either explicitly or implicitly, to refrain from:

- (a) doing business within a boycotted country or with the government, companies or nationals of that country;
- (b) doing business with a U.S. person engaged in trade within a boycotted country or with the government, companies or nationals of that country;
- (c) doing business with any company whose ownership or management is made up, all or in part, of individuals of a particular nationality, race or religion, or to remove or refrain from selecting corporate directors who are individuals of a particular nationality, race or religion;
- (d) employing individuals of a particular nationality, race or religion;
- (e) shipping or insuring products on a carrier owned, leased, or operated by a person who does not participate in or cooperate with an international boycott.

However, the law permits a taxpayer to:

- (a) agree to meet the requirements imposed by a foreign country with respect to an international boycott if a U.S. law, regulation, or executive order sanctions participation in or cooperation with that international boycott;
- (b) agree to comply with a prohibition on the importation into a boycotting country of goods produced in whole or in part in any boycotted country;
- (c) agree to comply with a prohibition imposed by a country on the exportation of products obtained in that country to any boycotted country.

On November 3, 1976, the Secretary of the Treasury published, effective that day, the initial list of countries which "may require participation in, or cooperation with, an international boycott, as a condition of doing business within such country, or with the government, a company, or a national of such country (within the meaning of section 999(b) of the Internal Revenue Code of 1954)."²

² 41 Fed. Reg. 48,384 (1976).

The list follows:

BAHRAIN
EGYPT
IRAQ
JORDAN
KUWAIT
LEBANON
LIBYA

OMAN
QATAR
SAUDI ARABIA
SYRIA
UNITED ARAB EMIRATES
YEMEN ARAB REPUBLIC
YEMEN, PEOPLES DEM. REP. OF

On November 10, 1976, the Secretary of the Treasury issued guidelines relating to the provisions of the Tax Reform Act of 1976.³

ARMS CONTROL AND DISARMAMENT

Radiological Weapons (U.S. Digest, Ch.14, §7)

The United States proposed at the United Nations, on November 18, 1976, that an international agreement be negotiated to prohibit the use of radioactive waste materials for the development of radiological weapons of mass destruction. In a statement before the First Committee of the General Assembly, Dr. Fred C. Iklé, Director of the Arms Control and Disarmament Agency, pointed out that "rapidly accumulating radioactive materials have the potential for use in radiological weapons—a hazard distinct from nuclear explosives" and that such weapons, if ever developed, could produce pernicious effects, both short term and long term, over substantial areas. He continued:

My government suggests that next year an appropriate forum, such as the CCD [Conference of the Committee on Disarmament], consider an agreement that would prohibit the use of radioactive materials as radiological weapons. Such an agreement would not affect the production of radioactive materials, either as a necessary by-product of power reactors or for other peaceful applications, or affect our call for storage of spent fuel under international auspices.

Such an agreement could complement the Geneva Protocol of 1925, which prohibits the use of poison gas and bacteriological methods of warfare. In addition, a radiological warfare agreement could contain a provision for appropriate measures by the parties to preclude diversion of radioactive materials for use as radiological weapons.

Such a commitment would, of course, be a particularly worthwhile undertaking for the major nuclear industrial states. Countries with substantial nuclear energy programs have accumulated large amounts of waste materials with extensive remaining radioactivity.

Negotiation of a radiological weapons agreement should not, of course, impede work on other multilateral arms control issues. It is our intent that it will not. But feasible arms control steps, such as this, should not go unrealized simply because larger problems have yet to be solved. Such a proposal, if adopted, would address a potentially significant future danger; each arms control agreement that is sound on its own merits can be another positive step toward a safer world.¹

³ *Id.* 49,923.

¹ ACDA Press Release 76-22, Nov. 18, 1976.

JUDICIAL DECISIONS

ALONA E. EVANS

*Arbitration—challenge to validity of award—disqualification of arbitrator—
Convention on the Recognition and Enforcement of Foreign Arbitral
Awards*

IMPERIAL ETHIOPIAN GOVERNMENT V. BARUCH-FOSTER CORP. 535 F.2d 334.
U.S. Court of Appeals, 5th Cir., July 19, 1976.

The Imperial Ethiopian Government petitioned for confirmation of an arbitral award pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (21 UST 2517, TIAS No. 6997, 30 UNTS 3). The award had been made by an arbitral tribunal, mutually selected by petitioner and respondent, in a dispute between the parties over the refusal of petitioner to meet its obligations to respondent after the latter had delayed drilling of a test oil well. The award constituted petitioner's counterclaim for \$703,188 in damages. Respondent challenged the award on the ground that the president of the tribunal should have been disqualified from serving because he had been associated with the Ethiopian Government between 1954 and 1958 in a project for the drafting of a civil code. Respondent demanded extensive discovery into this contention. The District Court affirmed the award, holding that as respondent had not objected to the composition of the tribunal when it was established, respondent was estopped from making such objection now. The Court of Appeals affirmed on different reasoning.

Observing that the party seeking to avoid enforcement of an arbitral award had the burden of proof, Circuit Judge Godbold took the view that respondent's demand for discovery simply represented an effort to "freeze the confirmation proceedings in their tracks and indefinitely postpone judgment. . . ." There was no evidence before the Court to suggest that the arbitrator should be disqualified by reason of an association with the Ethiopian Government which had terminated more than a decade before the arbitration; consequently, there was no ground for resorting to discovery into this matter.

*Arbitration—challenge to validity of award—Overseas Private Investment
Corporation (OPIC)*

OVERSEAS PRIVATE INVESTMENT CORPORATION V. THE ANACONDA COMPANY.
Misc. No. 75-192.
U.S. District Court, District of Columbia, July 20, 1976.

The Overseas Private Investment Corporation (OPIC) brought an action to vacate the award of an arbitral commission in a claim which was brought

- 535 F.2d 334, 337.

by the Anaconda Company against the Corporation¹ (9 U.S.C. §10 (1970)). OPIC contended that the award had been adversely affected by a conflict of interest involving a relationship between a member of the commission and a law firm which had had some limited association with respondents' counsel during the arbitration and had served respondents in earlier litigation. Respondents moved for affirmance of the award. Both parties moved for summary judgment. Finding no evidence of bias or other prejudicial conduct on the part of the arbitrator, District Judge Flannery held that respondents were entitled to the award and granted their motion for summary judgment.

Jurisdiction—act of state doctrine—expropriation without compensation

UNITED BANK LIMITED v. COSMIC INTERNATIONAL, INC. 542 F.2d 868.
U.S. Court of Appeals, 2d Cir., Sept. 30, 1976.

In a consolidated action, certain Pakistani and Bangladeshi corporations sought to recover \$530,409.46 with interest, representing the proceeds of sales of jute products in the United States. The proceeds were held by Cosmic International, Inc. (Cosmic), a Delaware corporation with its principal place of business in New York. The transactions had taken place before December 16, 1971, when Bangladesh became independent from Pakistan. The Pakistani plaintiffs' claims to the proceeds were disputed by the Bangladeshi plaintiffs who contended that they had succeeded to all properties owned by the Pakistani plaintiffs pursuant to the nationalization, admittedly without compensation, of the latter's properties by the Government of Bangladesh. The Bangladeshi plaintiffs argued that according to the act of state doctrine an American court could not inquire into the circumstances of the expropriation. The District Court, finding for the Pakistani plaintiffs, held that the situs of the debts was in New York at the time when the expropriation was ordered and that it could not give effect to an uncompensated extraterritorial expropriation. The Court awarded interest from the dates of filing of the Pakistani suits (392 F.Supp. 262 (S.D.N.Y. 1975)). The Court of Appeals affirmed the District Court's decision with regard to the act of state doctrine but awarded interest from the date when the causes of action accrued.

Supporting the application of the act of state doctrine, the Bangladeshi plaintiffs argued that the situs of the debts was the creditors' domicile, *i.e.*, Bangladesh. Taking the view that the situs was the debtors' domicile, District Judge Coffrin (sitting by designation) observed that "[f]or purposes of the act of state doctrine, a debt is not 'located' within a foreign state unless the state has the power to enforce or collect it."¹ The Bangladeshi plain-

¹ A digest of the award in *Anaconda Company and Chile Copper Company v. Overseas Private Investment Corporation*, Case No. 16 10 0071 72 (July 17, 1975) appears in 70 AJIL 135 (1976). The full text has been reprinted in 14 ILM 1210 (1975).

¹ Quoting *Menendez v. Saks and Co.*, 485 F.2d 1355, 1364 (2d Cir. 1973), *rev'd on other grounds sub nom.* *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 96 S.Ct. 1854 (1976); 68 AJIL 325 (1974), 70 AJIL 828 (1976)). Footnotes by court omitted.

tiffs also contended that the situs should be determined on jurisdictional grounds. The Court found no merit in this argument, pointing out that

[S]ince jurisdictional determinations would inevitably require American courts to engage in complex interpretations of foreign statutory and case law pertaining to jurisdiction, resolving situs questions on such a basis would deprive the act of state doctrine of certainty and predictability. . . . An even more fundamental reason for declining to adopt this approach is that the act of state doctrine would thereby be given needless scope. Where an act of state has not "come to complete fruition within the dominion of . . . [a foreign] government," *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, . . . 392 F.2d[706] at 715-16 [5th Cir. 1968, cert. den. 393 U.S. 924 (1968); 62 AJIL 978 (1968)], no *fait accompli* has occurred which would otherwise effectively prevent an American court from reviewing the act's validity. More importantly, in the absence of such a *fait accompli*, there is less likelihood that any ensuing judicial review would jeopardize this country's foreign relations.²

The Court also noted that it had not been shown that Cosmic was subject to Bangladeshi jurisdiction.

In a variation on the situs issue, the Bangladeshi plaintiffs contended that the debts at issue were security for earlier debts owed by the jute mills to certain banks which latter debts had their situs in Bangladesh. The Court pointed out that the facts did not support this argument with respect to one mill the headquarters and debt of which were located in Pakistan. The Court objected to this argument basically, however, because

If the argument they now advance were to prevail, the Bangladesh plaintiffs would effectively be allowed to accomplish in an indirect manner a result which they could not have achieved directly. The act of state doctrine was not intended to permit foreign governments to circumvent American public policy. For this reason, our courts have always been wary of inadvertently extending extraterritorial effect to foreign seizures.³

The Bangladeshi plaintiffs attempted to show that the expropriation could be justified in terms of American policy toward wartime confiscation under, e.g., the Trading with the Enemy Act (50 U.S.C. App. §1 *et seq.*). Coffrin, D. J., said:

It would hardly be "consistent" with American public policy to create a special exception for extraterritorial seizures committed in wartime. Aside from the antagonistic effect which such an exception would inevitably have on our foreign relations with previously friendly nations, this Court has already recognized that citizens of friendly sovereigns have a legitimate expectation that their property interests in the United States will receive the benefit of any protection our law affords.⁴

² 542 F.2d 868, 874.

³ *Id.* 876.

⁴ *Id.* 877, citing *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 52 (2d Cir. 1965), cert. den. 382 U.S. 1027 (1966); 60 AJIL 592 (1966).

Jurisdiction—crewman of foreign flag ship—minimal contact with forum—forum non conveniens—Jones Act

ANTYPAS v. CIA. MARITIMA SAN BASILIO, S.A. 541 F.2d 307.
U.S. Court of Appeals, 2d Cir., Aug. 2, 1976.

Plaintiff, a member of the crew of *The Eurybates*, a ship registered in Greece but owned and operated by a Panamanian corporation, sought recovery under the Jones Act (46 U.S.C. §688) for maintenance and cure and damages for injuries which he had received while aboard the ship on the high seas on a voyage between Hamburg and the Far East. Jurisdiction was predicated upon the presence in New York of the agent for the shipowner, a New York corporation, which was, in turn, the subagent for an English company of the same name. The New York agent was authorized to solicit business for the shipowner, including the establishment of rates, allocation of tonnage, and the setting of sailing schedules. Defendants, arguing that the contacts with the forum were minimal according to the test of *Lauritzen v. Larsen* (345 U.S. 571 (1953); 47 AJIL 711 (1953)), moved to dismiss the suit on the ground of *forum non conveniens*. The District Court dismissed the action. On appeal, the Court of Appeals reversed this decision.

In the opinion of Mr. Justice Clark (U.S. Supreme Court ret., sitting by designation), the contacts between the agent and the ship, including various business relations and the fact that some of the stockholders of the shipowner were American nationals, outweighed such factors as the flag, place of incorporation of the shipowner, and the nationality of plaintiff and warranted the assumption of jurisdiction under the Jones Act by the District Court.

Circuit Judge Van Graafeiland, dissenting, took the view that as some of the facts on which the majority's decision rested were in dispute, including the American nationality of certain stockholders, this action could not be maintained under the Jones Act.

Environmental protection—effect of construction of Darien Gap Highway through Panama and Colombia

SIERRA CLUB v. COLEMAN. Civil Action No. 75-1040.
U.S. District Court, District of Columbia, Sept. 23, 1976.

Plaintiffs sought an extension of a preliminary injunction which had been entered against defendants on the grounds that they had not complied with all of the requirements of the National Environmental Policy Act (NEPA) (42 U.S.C. §4321 *et seq.*) in the environmental impact assessment which they had prepared with regard to the proposed construction of the Darien Gap Highway through Panama and Colombia (405 F.Supp. 53 (D.D.C. 1976)). That statement had not dealt fully with control of aftosa (foot and mouth disease), the impact of the highway on the Cuna and Choco Indians who lived in the area of the proposed construction, or the environmental considerations arising from possible choice of alterna-

tive routes. Defendants then prepared a Final Environmental Impact Statement. Plaintiffs argued that it did not remedy all of the deficiencies in the earlier statement. The District Court granted plaintiffs' motion for an extension of the preliminary injunction.

District Judge Bryant was concerned that the second statement was unduly optimistic about the present condition of controls over aftosa in Central America and Colombia. While recognizing that Panama's program of control was "well-established,"¹ the Court observed that the evidence indicated that programs elsewhere were only in a developmental stage and show little prospect for effective control of the disease in the near future. With regard to the impact of the proposed highway upon the Indians of the region, the Court was critical of defendants' " cursory and casual" ² examination of the socio-economic implications of the project. Bryant, D. J., stated that

While even the certainty of cultural extinction for both tribes would not necessarily preclude approval of the project, NEPA requires that the agency make such a decision knowingly and with due regard for its environmental consequences.³

As for consideration of alternative routes, the Court found that the second statement, as with the first, continued to focus upon engineering problems rather than environmental factors.

Aliens—deportation—fear of persecution in state of destination—effect of Department of State views on prospective persecution

ZAMORA v. IMMIGRATION AND NATURALIZATION SERVICE. 534 F.2d 1055. U.S. Court of Appeals, 2d Cir., April 29, 1976.

Two cases challenging the denial of relief under §243(h) of the Immigration and Nationality Act of 1952 as amended (8 U.S.C. §1253(h)) were considered by the Court of Appeals. In the first case, petitioners, Philippine nationals, had entered the United States on visitors visas. After receiving several extensions of their stay, deportation proceedings were brought against them. They applied for political asylum pursuant to 8 C.F.R. §108, Operating Instructions 108, and §103(a) of the Act (8 U.S.C. §1103(a)). The Office of Refugee and Migration Affairs (ORM) of the Department of State reported to the Immigration and Naturalization Service (Service) that there were no grounds for a grant of asylum. Conceding deportability, petitioners applied for relief under §243(h). They contended that they would be subject to persecution in the Philippines because of their political views and because civil liberties were repressed there. Their statements were supported by newspaper clippings and alleged family experiences. The Immigration Judge denied their request, observing that the ORM letter had been noted but that he had not con-

¹ Civil Action No. 75-1040, 3. Full text reprinted in 15 ILM 1417 (1976).

² *Id.* 5.

³ *Id.* 7.

sidered it in arriving at his decision. The Board of Immigration Appeals dismissed petitioners' appeal.

The second case involved a Haitian national who had also entered the United States on a visitor's visa which had been extended after which the Service had instituted deportation proceedings against her. Petitioner's request for political asylum was denied following an adverse opinion from ORM. Petitioner then invoked §243(h) on the grounds that she would be persecuted in Haiti because of family connections with the former Magloire regime. Although she stated that several members of her family had been arrested some years after the Duvalier regime had come to power, she admitted that she had not been arrested nor hindered in leaving the country and that her husband and children resided in Haiti. The letter from ORM was offered in evidence in the §243(h) hearing without objection from petitioner. The Immigration Judge denied her application; the Board of Immigration Appeals sustained this decision. The Court of Appeals denied the parties' petitions for review of the Board's orders.

Circuit Judge Friendly pointed out that the main issue in both cases was the recurring one of the relation between an application under §243(h) and a request for asylum under 8 C.F.R. §108 and the effect of ORM's letters in both proceedings. Procedurally, a request for asylum did not affect an application for relief under §243(h) which was governed by 8 C.F.R. §242.17(c). The procedural difficulty arose over the impact of the ORM's letter regarding asylum on the §243(h) application, there being no explicit provision in the latter proceeding for consultation with the Department of State. The case law as to the use of the Department's views in §243(h) proceedings was not conclusive. Friendly, C. J., decided to resolve the matter. The Court said:

The attitude of the country of prospective deportation [*i.e.*, destination] toward various types of former residents is a question of legislative fact, on which the safeguards of confrontation and cross-examination are not required and on which the IJ [Immigration Judge] needs all the help he can get. He cannot expect much from the applicants. . . . The obvious source of information on general conditions in the foreign country is the Department of State which has diplomatic and consular representatives throughout the world. While there is undoubted truth in the observation in *Kasravi v. INS*, . . . 400 F.2d [675] at 677 n.1 [9th Cir. 1968], as to there being some likelihood of the Department's tempering the wind in comments concerning internal affairs of a foreign nation, it is usually the best available source of information and the difficulty could be mitigated by not spreading its views on the record, as [8] C.F.R. §242.17(c) permits. We therefore see no bar to the admissibility of statements of the Department of State or its officials abroad which inform the IJ and the Board of Immigration Appeals of the extent to which the nation of prospective deportation engages in "persecution on account of race, religion, or political opinion" of the class of persons to whom an applicant under §243(h) claims to belong, and reveal, so far as feasible, the basis for the views expressed, but do not attempt to apply this knowledge to

the particular case, as the ORM does in making recommendations with respect to requests for political asylum.¹

The Court observed, however, that such letters had to be weighed carefully as to their use in §243(h) proceedings. Friendly, C. J., said:

When these letters are introduced into the §243(h) inquiry, they present ORM's conclusions as to an adjudicative fact, based, in the present examples, solely on the alien's own statements and phrased in the very language of the §243(h) standard. Adjudication in the withholding process is, however, the task of the IJ and the Board of Immigration Appeals. Particularly in the light of the difficulties confronting the alien in proving his case, there is risk that such communications will carry a weight they do not deserve. It should not be difficult for the INS and the Department of State to conform their practices in the future to the views here expressed. . . .

On the other hand we are unwilling to announce a rule that would call for reversal of all denials of §243(h) applications where an ORM recommendation has been received at the hearing. Before we would reverse because of the receipt of ORM recommendations, a petitioner must show some likelihood that it influenced the result.²

Given the weak cases of both sets of petitioners, the denial of their applications under §243(h) could not be attributed to the ORM letters.

Extradition—effect of witness protection agreement on surrender order

PEROFF V. HYLTON. 542 F.2d 1247.

U.S. Court of Appeals, 4th Cir., Oct. 21, 1976.

Sweden requested the extradition of petitioner on a charge of fraud, pursuant to the 1961 Extradition Treaty with the United States (14 UST 1845, TIAS No. 5496, 494 UNTS 141). After extradition was granted, petitioner sought judicial review of the order, arguing that probable cause had not been established and that a witness protection agreement with the Department of Justice relevant to his part in other proceedings concerning the illegal narcotics trade constituted a bar to his extradition. The District Court denied his petition for habeas corpus. The Court of Appeals affirmed this decision.

Chief Judge Haynsworth found that probable cause for the extradition of the accused on the charges submitted by Sweden had been fully established at the extradition hearing. With regard to the witness protection agreement, the Court observed that "[i]f such an agreement could ever justify non-compliance with solemn treaty obligations, . . . this one does not."¹ The Court pointed out that

A denial of extradition by the Executive may be appropriate when strong humanitarian grounds are present, but such grounds exist only when it appears that, if extradited, the individual will be persecuted,

¹ 534 F.2d 1055, 1062.

² *Id.* 1063.

¹ 542 F.2d 1247, 1249.

not prosecuted, or subjected to grave injustice. Such a reason is not present here.²

The witness protection agreement was designed to assure the safety of the accused, not to relieve him from criminal charges. It was reasonable to assume that Swedish authorities would also assure his safety.

Treaties—abrogation by war—abrogation by subsequent inconsistent legislation—1794 Jay Treaty

AKINS v. UNITED STATES. 407 F. Supp. 748.
U.S. Customs Court, Jan. 26, 1976.

Plaintiff, a U.S. national and a Penobscot Indian, entered a protest against the payment of duty, amounting to \$1.20, on a pair of hiking boots which he had purchased in Canada for his own use. He claimed that, as a member of one of the Six Nations, he was exempted from the payment of duties by Article III of the 1794 Treaty of Amity, Commerce and Navigation (Jay Treaty) (8 Stat. 116). Defendant responded that Article III had been abrogated by the War of 1812. Both parties moved for summary judgment. The Customs Court denied plaintiff's motion.

Following an exhaustive examination of the historical background of the Jay Treaty and the effect of the War of 1812 on it as developed in case law, Chief Judge Boe held that there was no reason to depart from the conclusions reached in *Karnuth v. United States*, 279 U.S. 231 (1929) and *United States v. Garrow*, 88 F.2d 318 (C.C.P.A. 1937), cert. denied 302 U.S. 695 (1937) that Article III had been abrogated by the War of 1812. The Court pointed out that apart from this conclusion the Tariff Act of 1897 (30 Stat. 151) effectively terminated the privileges contained in Article III which had been translated into tariff legislation by Congress beginning in 1799.

Treaties—interpretation—foreign trademarks—Paris Union Convention, 1934 London revision

SCM CORPORATION v. LANGIS FOODS LTD.*

Patent, Trademark & Copyright Journal, D-1 (no. 285, July 1, 1976)
U.S. Court of Appeals, District of Columbia, June 23, 1976.

Plaintiff, a Canadian corporation (Langis), applied for registration of the trademarks LEMON TREE, APPLE TREE, and ORANGE TREE in Canada on March 28, 1969 and began to use these trademarks in Canada on May 15, 1969. On that same date, defendant, a U.S. corporation, (SCM) began to use LEMON TREE in the United States. Both parties later filed applications with the U.S. Patent Office for the registration of the three trademarks. The Patent Office registered LEMON TREE to plaintiff and indicated that APPLE TREE and ORANGE TREE would also be registered to plaintiff if no

² *Id.*

* Text of decision provided by Peter Weiss, Esq.

opposition were instituted thereto. Defendant then notified the Patent Office of its opposition to plaintiff's APPLE TREE and ORANGE TREE applications and requested the cancellation of plaintiff's LEMON TREE registration. These moves by defendant were denied by the Trademark Trial and Appeal Board on the ground that plaintiff's prior rights in the trademarks were established by the date of filing for registration in Canada. SCM then brought an action to cancel the three registrations. The District Court granted SCM's motion for summary judgment, holding that under U.S. law SCM's priority of use of LEMON TREE in this country took precedence over Langis' registration and use of this trademark in Canada. The Court remanded SCM's opposition to the registration of APPLE TREE and ORANGE TREE to Langis to the Trademark Trial and Appeal Board (376 E.Supp. 962 (1974)). The Court of Appeals reversed this decision.

Circuit Judge McGowan pointed out that the issue was the resolution of the conflict between the U.S. law which required prior use of a trademark before registration and Canadian law which permitted registration before use.¹ Section 44(d) (15 U.S.C. §1126(d)) of the Lanham Act recognized the filing date for trademark registration by a foreign national in a foreign country for the purpose of U.S. registration. The District Court had accepted this constructive filing date but had found for SCM because it could show first use in the United States. Langis, however, contended that §44(d) provided for a constructive use date, *i.e.*, the date of first use in the foreign country after application for registration there but before application for registration in the United States. The Court of Appeals found that this argument accorded with §44(b) (15 U.S.C. §1126(b)) of the Lanham Act which provided that

Any person whose country of origin is a party to any convention or treaty relating to trademarks, trade or commercial names, or the repression of unfair competition, to which the United States is also a party, or extends reciprocal rights to nationals of the United States by law, *shall be entitled to the benefits of this section under the conditions expressed herein to the extent necessary to give effect to any provision of such convention, treaty or reciprocal law, in addition to the rights to which any owner of a mark is otherwise entitled by this chapter.*²

The Court pointed out that the objective of this section was underlined by §5 (15 U.S.C. §1127) which stated that "the intent of Congress in enacting the 1946 [Lanham] Act was 'to provide rights and remedies stipulated by treaties and conventions respecting trademarks. . . .'"³ McGowan, C. J., said, after examining Article 4 of the 1934 London revision⁴ of the 1883

¹ Trademark Act. of 1946 (Lanham Act), 15 U.S.C. §1051(a)(1) (Supp. IV, 1974), cited by Court. Footnotes by court omitted.

² PATENT, TRADEMARK & COPYRIGHT JOURNAL, D-1 at D-2 (No. 285, July 1, 1976) (emphasis by court).

³ *Id.* D-3.

⁴ 53 Stat. 1748, TS 941, 3 BEVANS 223, 192 LNTS 17.

Convention of the Union of Paris:

This revised version clearly provides that an intervening use during the priority period cannot give rise to rights on the part of third parties. The only rights of third parties specifically protected are "[those] rights acquired by third parties *before* the day of the first application on which priority is based." Thus, to the extent that the property rights in this case depend on the Paris Union Treaty, Article 4 reinforces our conclusion that a foreign applicant's mark must be protected in this country from the date of the foreign application even as against an intervening first use by another in the United States.⁵

⁵ PATENT, TRADEMARK & COPYRIGHT JOURNAL, D-1 at D-3 (cited note 2 *supra*) (emphasis by court).

BOOK REVIEWS AND NOTES

Edited by Leo Gross

International Society in Search of a Transnational Legal Order. Selected Writings and Bibliography of F. M. van Asbeck. Edited by H. F. van Panhuys and Mrs. M. van Leeuwen Boomkamp, under the auspices of the Cornelis van Vollenhoven Foundation. Leiden: A. W. Sijthoff, 1976. Pp. xxvi, 604. Dfl. 110.00, \$41.50.

Some international lawyers must have acquired a stereotype of the traditionalist and "colonialist" European jurists of preceding generations. If so, they will find some surprises in this compendious volume of the late Professor van Asbeck's writings. Van Asbeck may indeed be described as colonialist in a specific sense inasmuch as a considerable part of his professional career was spent in the Netherlands East Indies as a government official and as a professor of comparative colonial law. He also represented the Netherlands in colonial matters and served as a member of the Permanent Mandates Commission of the League of Nations. Van Asbeck was also a "traditionalist" in that he drew deeply on Western juristic thought and on the moral teachings of Christianity. Yet these ideas and his colonial experience led him to conclusions in advance of his time.

Three major themes that run through this book demonstrate the continued vitality of his ideas. The first relates to self-determination. Even in 1931 while still an official in the Dutch colonial service, van Asbeck raised the "magnificent struggle" for the elimination of colonialism and for the right of each people to determine its own destiny. But he was also aware of the dangers of carrying self-determination to the point of fragmenting new states under pressure of localism. He foresaw the "ragging problems" faced by many new states in creating a nation out of diverse ethnic communities and cultures. His solution for the anticipated communal conflicts and minority deprivation was international regulation to provide protection "wherever friction may cause a conflagration." He may appear today as too optimistic about the acceptance of international protection of minorities on the pattern of the League of Nations but his broad conclusion remains persuasive; it must still be the task of the international community to protect minorities threatened with annihilation or severe deprivation.

Closely related to this is the second major theme—the international protection of human rights. In his later years, this was van Asbeck's main practical interest, particularly as a member of the committee of experts of the ILO and for 11 years a judge of the European Court of Human Rights. His writings reflect his involvement and idealism. He shows in one article how the 1948 Universal Declaration of Human Rights has had "legal effects outside the sphere of international jurisdiction" by influencing the activities of international institutions and the contents of later regional and global

es. Human rights are treated by him as universal standards for a common humanity and he does not acknowledge moral relativism or cultural pluralism in this connection. Yet recent events indicate an increasing tendency to accept relativism in moral judgments and in social values as justifying departures from basic human rights, with unhappy consequences for the victims of oppression. There is no doubt where van Asbeck would stand on this issue.

Van Asbeck's concern with human rights also permeates a third theme in this book—the role of international organizations. He recognizes that international machinery will have to include more than purely governmental bodies if individual and group rights are to be protected. Access to international bodies should extend to nonstate entities and international decisionmaking should include nongovernmental associations and experts. Van Asbeck's experience in the Mandates Commission and in the tripartite ILO convinced him of the value of nonofficial participation. But governments are more reluctant today than previously to share authority with nongovernmental groups and in many respects earlier trends toward wider participation have been reversed. Nonetheless, the issue remains a live one. Governmental bureaucracies do not fully represent the people or reflect their myriad activities and beliefs. International cooperation, if it is to be effective, will have to recognize that scientific bodies, professional associations, labor, the moral and religious communities of mankind, and others must have a role in decisions. Van Asbeck was on the right track in this respect.

A special tribute is due the editor of this volume, the late Professor H. F. van Panhuys whose untimely death occurred in 1976. Professor van Panhuys exemplified the highest traditions of international law in the Netherlands; he was a profound scholar, a wise counselor, and a practical idealist. He was, in addition, a cultured and talented human being whose charm and grace endeared him to innumerable friends all over the world.

OSCAR SCHACHTER

Public and Private Enterprise in Mixed Economies. Edited by Wolfgang Friedmann. New York: Columbia University Press, 1974. Pp. xi, 394. Index. \$17.50.

With the subtle sophistication which has characterized all of his work, the late Professor Wolfgang Friedmann and six international colleagues have written an interesting, timely, provocative, and exploratory comparative study on the modalities, structures, and forms of public enterprises in six countries. The principal emphasis of the study is "on the conditions of coexistence, competition and cooperation between public and private enterprise."

Positing that public enterprises have and will continue to increase, these international specialists have analyzed the nature and form of the enterprises and their interaction with private enterprises. The countries included and their authors are: United States (Prof. Arthur Selwyn Miller); United Kingdom (Prof. Terence Daintith); France (Prof. Roland Drago);

Italy (Prof. Guiseppe Treves); Turkey (Prof. Tuğrul Ansay); and Nigeria (Prof. T. O. Elias). The concluding chapter by Wolfgang Friedmann integrates, compares, and draws conclusions from these contributions.

Each country study provides a short historical review of the development of state enterprises and their legal basis and is followed by a more detailed exploration of particular enterprises. Rules and practices regulating their interaction with private enterprises complete each study. Some of the country studies, *e.g.*, Turkey, tend to be rather formalistic in their analysis in that statutes and regulations are reviewed but little is provided about state practice in regard to the rules. Even in the Turkish study there is a brief but informative discussion about governmental price manipulation in aid of a governmental enterprise in direct competition with a profitable private sector industry (artificial lumber). The government simply set the price of the products below cost. Other country studies, *e.g.*, France, provide an excellent analysis of the relationships between public and private enterprises (as well as the in-between hybrids) based upon a review of decisions of the Conseil d'Etat. Drago's article, in addition, includes a discussion of the changing attitude of France towards competition and the effect of the Treaty of Rome on rules relating to public enterprises.

Countries are differentiated by Friedmann on the basis of the breadth and depth of government use of public enterprises. He discerns the following major patterns: The United States is seen as a regulated private enterprise system and attempts to maintain, as far as possible, the rules of the game for a market economy. The U.K. and France are considered to be mixed advanced economies with limited public and wider private sectors. In general, manufacturing remains in the private sector except for financial emergencies (Rolls-Royce and Upper Clyde Shipyards) or for political reasons (the takeover of Renault due to wartime collaboration). In both of these countries the trend is seen towards increased government participation in manufacturing. In Italy and Turkey the share of the state in industrial enterprises has been and is increasing. In Nigeria the emphasis is overwhelmingly on state enterprises and initiative. Cooperation between public and private enterprises in common ventures is increasingly evident in Turkey, France, and Nigeria, resulting in various types of mixed enterprises. The United States and the United Kingdom have very few such ventures.

In defining public and private enterprises, Friedmann concentrates on substance and not form. Thus, in addition to analyzing shareholdings, due attention is paid to sources of financial support, managerial involvement, long-term government contracts, controls instituted by various regulatory agencies, and the use of *contrats administratifs*. Under this analysis, large U.S. defense industries dependent for both resource and development funds on long term government contracts are placed in a category of semipublic enterprises which "stops short—in legal form, though not perhaps in substance—of nationalization or an equity partnership."

The question of how equality and fairness of competition between public

treatment of private enterprise in mixed economies can be ensured by law "is the most crucial of the many problems set by the inquiry." Turkey is offered as a country which has given more attention to public/private balance than others.

Like many of Friedmann's earlier works, this one has set forth the relevant questions to enable one to begin to come to grips with the underlying problems. Scholars, government officials, businessmen, and others concerned with public policy will find this book to be an excellent starting point. It is sad to note that this is the last of Wolfgang Friedmann's books before his untimely death.

ROBERT F. MEAGHER

International Claims: Their Settlement by Lump Sum Agreements. Part I: The Commentary; Part II: The Agreements. By Richard B. Lillich and Burns H. Weston. Charlottesville: University Press of Virginia, 1975. Pp. Part I: xxii, 372. Indexes; Part II: xxxi, 372. Appendixes. \$37.50 for the set.

International claims arising out of nationalizations or other state action affecting foreign-owned property have frequently been settled in recent years through agreements providing for payment of a lump sum to the claimant state, to be distributed by it to the persons concerned. Building on their earlier studies of national claims commissions, Lillich and Weston have now written what will long remain the definitive work on this method of settlement of international claims.

The authors set themselves, and successfully discharged, a threefold task: to collect and publish all postwar lump sum agreements; to show that such agreements constitute an important source of contemporary international law; and to analyze the procedural and substantive rules found in them.

The principal study (entitled, in old-fashioned manner, "The Commentary") takes up most of the first volume. It consists of a general chapter on the legal significance of lump sum agreements and four chapters reviewing in detail their provisions on eligibility of claimants, the substantive bases and types of claims, and the assessment of compensation.

The second part and a last-minute Appendix to the first part contain English texts of 139 lump sum agreements, with notes and citations. Although the authors prudently warn that they may have missed a few agreements, their collection of these hard-to-find texts constitutes in itself a signal service to the legal profession and to chanceries the world round.

The authors cogently attack what they call "the *sui generis-lex specialis* theory" typified by the International Court of Justice statement in the *Barcelona Traction* case, that lump sum agreements are merely "specific agreements . . . reached to meet specific situations" so that no legal conclusions relevant to other situations can be drawn from them. (One must admit that this case becomes an object of almost obsessive concern in the book.) Since this view has never been developed in detail by its supporters, Lillich and Weston build up a series of possible doctrinal argu-

ments which they duly proceed to knock down. Greater stress on the affirmative aspects of their argument might have been more effective. Still, their basic position is persuasive: lump sum agreements represent an established pattern of recent state practice, thus qualifying as "evidence of a general practice accepted as law." They should therefore "be treated no differently than any other expression of 'international law'" (p. 262). The last sentence is most significant. The authors object to the relegation of lump sum agreements to second class legal status, but only to assert that their "provisions, like all prescriptions that are invoked for precedential purposes, always must be subjected to systematic contextual and value analysis" (p. 263).

The detailed review of the agreements demonstrates that, with some (important) exceptions, the principles applied by them are generally consistent with those established in earlier years by international tribunals. Thus, traditional rules are applied to the nationality of claims, with few innovations (e.g., some qualifications to the rules on corporate nationality, less restrictive treatment of shareholders' claims). In most instances, the exercise of national jurisdiction has been given effect only as to assets within the territory of the acting state. Most importantly, practice confirms that some compensation is normally paid for takings of foreign-owned property, but the compensation is generally partial and reflects the "special circumstances" in each case.

While Lillich and Weston strive clearly to distinguish between their findings, the statement of traditional legal rules, and their own policy preferences, a confusing interaction is not always avoided. In trying to draw detailed legal conclusions from deliberately obscure texts, the authors appear on occasion to be forcing their material, making it tell more than it can. They elegantly describe the risk they took: "As with any intellectual or scientific endeavor which strives toward the explicit ordering of actual but imperfectly revealed experience, there comes a point where, for lack of 'hard data' and sufficient general knowledge, one can strain too far to infer established patterns and trends" (p. 112). As a result, their analytical-inductive study, which often produces clear and useful conclusions, leads sometimes to less convincing findings because an adequate factual basis for induction is lacking (especially in view of the continuing lack of information on the background and application of many of the agreements) or because the texts they construe deliberately avoid traditional concepts and distinctions.

Admittedly, a sophisticated analysis of traditional law could not be undertaken here. However, use of the "customary norms" as the study's basic frame of reference unduly overstates the certainty and clarity of these norms; this is unavoidably reflected in the study's conclusions. For example, the authors make discrete findings as to each of the three "elements" of the official U.S. position on compensation; they conclude that lump sum agreement practice tends to uphold the "effectiveness" requirement and largely to disregard the "promptness" and "adequacy" requirements (pp. 208-47, 254-60). Yet, given the dubious validity of that basic

position as a statement of established law and the intimate interconnection of these "elements" (as the authors acknowledge), how useful can these "findings" be?

The assumption which appears to underlie the entire study and to some extent colors the interpretation of the agreements is that, by and large, the traditional principles concerning the treatment of foreign property remain relevant and indeed, with a few changes, quite viable today. Even the gross inadequacy (by classical standards) of the compensation paid is largely attributed to differences as to methods of valuation. The significance of this last factor (and the usefulness of the authors' pioneering earlier work in this area) cannot be gainsaid. But it is one thing to argue that better understanding and skillful manipulation of valuation standards may help to bring about a reconciliation of otherwise antithetical positions; it is quite another to attribute the antithesis to differences in such standards. It all comes down to the need for close "systematic contextual and value analysis" of the current state of the entire field, a task which, it is to be hoped, the authors, jointly or severally, will undertake.

The book for the most part is written in readable, frequently elegant, style. With commendable honesty, the authors expressly revise several statements and positions taken in their earlier studies. Their desire for precision leads them sometimes to jargon and heavy sentence construction; these, combined with overdetailed explanations and citations, put them, now and then, on the wrong side of the line that separates learning from pedantry. That is the price to be paid for comprehensive analysis of a difficult topic.

A. A. FATOUROS

International Regulation of Multinational Corporations. By Don Wallace, Jr. New York, Washington, and London: Praeger Publishers, 1976. Pp. xii, 233. \$17.50.

Professor Wallace has written a useful analysis of the several proposals for international regulation of multinational corporations, but his book suffers somewhat from being spread too thin. It seeks to deal with the nature of the international economy in the post-Bretton Woods era, the charges against and the justifications of the MNC,¹ its role in matters of trade, investment and monetary policy, and the numerous issues involved in international agreement and even international administration. Moreover, it was written before the June 21, 1976 Declarations, Guidelines and Decisions of the Organisation for Economic Cooperation and Development, and before the UN Commission on Transnational Corporations had organized its work looking toward a code of conduct dealing with TNCs. For a work which deals as explicitly with details of proposed regulatory schemes as does this one, the timing is unfortunate. Nonetheless, the book is a useful review of issues and relationships, much of which will be relevant both to interpretation and administration of the OECD Guide-

¹ The terms Multinational Corporation (MNC) and Transnational Corporation (TNC) are herein used interchangeably.

lines and to the formulation of such agreement as may emerge from the United Nations (or other forums).

Presumably as a result of attempted breadth the treatment suffers from gaps. Thus, while it is recognized that developing and industrialized nations may have differing views about the content of a code, the fundamental reason why the "balance" of the OECD Guidelines is of such little appeal to the Group of 77—that they view the function of a code as one of *rectifying*, not of *maintaining*, a balance—is not explicitly made. The Group of 77 requires a code weighted in favor of the developing nations, not one judiciously balanced. What makes the OECD "package" acceptable to capital-exporting nations—the principle of nondiscrimination and of national treatment—is precisely what is contra to the expressed desiderata of the Group of 77. Nor does the book deal with the possibility that international regulation may be the result of an untidy but nonetheless effective web of national regulations both in home and host nations, of self-imposed criteria, of such semiformal norms as those of accepted accounting practices, and of a variety of international understandings, many of a partial nature.

Yet, if we were to consider altogether such disparate items as the current efforts of the U.S. Internal Revenue Service to "reconstruct" transfer prices, corporate progress toward fuller disclosure of corporate accounting and business practices (partially voluntary, partially impelled by such forces as SEC investigations and stockholder suits), the effects of regional legislation like that of Decision 24 of the Andean Common Market and of national legislation like that of the Canadian Direct Investment statutes, it might be argued plausibly that much of the substance of international regulation is already in place. The tendency to confuse neatness with effectiveness has led too many commentators to find regulation only within the four corners of a treaty-like document, whether it be voluntary or mandatory. And Professor Wallace does tend to deal in terms of a cohesive, orderly, easily recognizable understanding and method of regulation and to confine analysis to the feasibility and desirability of such a unitary scheme. Indeed, the codifiers may well find, as they put their paragraphs and sentences in logical order, that the substance of their task has already been done. This finding to some extent agrees with Professor Wallace's conclusion that a comprehensive and enforceable scheme of international regulation of the TNC is not an immediate likelihood.

Nonetheless much can be said for an orderly marshaling of the voluminous literature of this field and for a logical consideration of ideas, issues, and proposals. Professor Wallace's book, particularly considering its meritorious brevity, accomplishes that task. A minor irritant, at least for this reader, is the lack of an index.

SEYMOUR J. RUBIN *

* The author of this review is U.S. Representative to the UN Commission on Transnational Corporations; nothing contained herein can be taken to reflect any official view.

Nacionalización y Recuperación De Recursos Naturales Ante La Ley Internacional. By Eduardo Novoa Monreal. Mexico City: Fondo De Cultura Económica, 1974. Pp. 113.

De Visscher has noted that "nationalization offers, both in the internal and international order, a striking example of the tension between politics and law." The 1971 Chilean nationalization of U.S. copper interests is an apt case in point. It sparked a political crisis between the United States and Chile and brought into clear focus divergent views on the international law principles applicable to the taking of alien-owned property. In this book, Professor Novoa, who was the architect of the copper nationalizations and Salvador Allende's closest legal adviser, seeks "to clarify what the actual rules and principles of public international law are with respect to nationalizations in general and the recuperation of natural resources in particular" (p. 7).

Throughout the work, Novoa sharply criticizes the traditional position of the United States that the taking of an alien's property for a public purpose is contrary to international law unless it is accompanied by "prompt, adequate, and effective compensation." While sharing Katzarov and other Third World publicists' rejection of this orthodox compensation standard and of any international legal responsibility on the part of the nationalizing state to pay compensation to an alien, Novoa relies on the writings of Bindschedler, De Visscher, Friedmann, Lauterpacht, and other Western publicists to support his position that postwar nationalizations involving fundamental political, economic, and social reforms cannot be governed by outmoded legal concepts chiefly designed to protect absolute respect for private property and other acquired rights of aliens.

The work is divided into four principal parts. The first traces the historical evolution of the legal recognition and protection of private property rights in Western society during the 18th and 19th centuries and the consequent development of the customary law of state responsibility for injury to aliens with its requirement of a minimum standard of treatment for aliens. The second and third parts consist of an extensive analysis of the distinctions between expropriation and nationalization. Novoa argues that the broad scope and objectives of recent nationalizations, particularly in cases involving deprivations in major resource areas to achieve a redistribution of production and wealth, distinguish them from the more limited traditional practice of expropriation. Nationalizations thus should be regarded as *sui generis* and should not be subject to the compensation criteria applicable to expropriatory claims. The author views nationalization as a purely internal measure the legality of which must be determined solely by reference to municipal criteria. He indicates that the diversity of contemporary state practice in the area of property takings belies the U.S. assertion that international law requires the payment of a full indemnification for the taking of alien-owned property. This insistence on the absolute respect for acquired rights, he maintains, is an unacceptable obstacle to legitimate attempts by states to achieve essential economic and social re-

forms for the general welfare. Novoa then sketches the background and salient provisions of the UN Resolution on Permanent Sovereignty Over Natural Resources (G.A.Res.1803), which he characterizes as declaratory of actual international law principles governing nationalizations and therefore binding on states as a whole.

This book should be interesting to students and practitioners of international law in that it is an eloquent and provocative restatement of the Third World position in the area of property takings by one of Latin America's foremost jurists and polemicists. Unfortunately the book's publisher has no immediate plans for an English translation.

ROBERT KOGOD GOLDMAN

Ocean Space Rights: Developing U.S. Policy. By Lawrence Juda. New York, Washington, and London: Praeger Publishers, 1975. Pp. xv, 300. Index. \$20.

International law, as noted in the Foreword to this concise and perceptive text, has been "generally studied without much, if any, reference to the ways in which each state's own interests and policies, in their relation to international law, come to be shaped." There is need for "the study of subsystem factors," for consideration of "the domestic political processes that shape the systems officially espoused by governments." As a case study in these aspects of international law, Professor Juda has chosen to examine the processes by which the legal doctrine of the continental shelf has developed in the United States. The time covered is from just prior to the Truman Declaration of 1945 to the beginning of the Third Law of the Sea Conference.

The author begins with a discussion of events leading up to the 1945 Declaration, moves through the First Law of the Sea Conference, the 1967 Pardo initiative at the United Nations, and the Seabed Committee debates. Included also are discussions of domestic events, such as the Stratton Commission deliberations and the U.S. oceans policy proposal of May 1970. A central issue throughout the text is the interactions in policy formulation among private interest groups and government agencies. Among the latter, the author frequently cites the Interior, State, and Defense Departments, while in the private sector are the National Petroleum Council, the American Mining Congress, and representatives of the various segments of the fishing industry. The Interior Department emerges as the champion of a broad shelf policy, constantly seeking to expand the area of the continental margin over which the United States has jurisdiction. The Defense Department is generally in opposition to Interior's shelf decision, while State seeks to move cautiously on shelf policies because of possible international repercussions.

Only half of the book is actual text, the rest being appendices. In such short space Professor Juda can do little more than highlight the intricate interplays of interest in the evolving shelf policy, but this he does skillfully. Unfortunately he could not foresee the growing importance with

respect to shelf issues of the Treasury Department, the Department of Commerce, and the public and private environmental organizations. Nor did he anticipate, with the collapse of the Trusteeship Zone proposal, the contest among U.S. interests over where on the outer continental margin the new limits of national sovereignty should be placed. But these omissions are more than balanced by a lively and well-documented account of three decades of developing U.S. continental shelf policy and of the various interests and groups which contributed to the formulation of that policy.

LEWIS M. ALEXANDER

Basic Problems of the European Community. Edited by P. D. Dagtoglou. Oxford: Basil Blackwell, 1975. U.S. Distributors, Fred B. Rothman & Co. Pp. xvii, 286. Index. \$22.50.

This book is a collection of nine essays by distinguished European authors who purport to define some basic problems confronting the integration process of the European Community. In some instances, mere definition is offered while other essays suggest some solutions or alternatives to the problems identified. The subject matter of the articles ranges from specific institutional analysis, such as of the European Court or the Commission's role compared to the Council and Assembly, to more process-oriented discussions regarding federation and constitutional system development on an international scale. In spite of the broad scope of the collection, and the unavoidable contrast of positions or interpretations that it engenders, the editor, Professor Dagtoglou, notes three assumptions that are implicit in each essay: (1) the only alternative to the Community is a better community; (2) the basic problem confronted by the Community is constitutional in nature, that is, power, and who should or does control it; and (3) legal, institutional, and political factors must always be recognized in the integration process.

All of the essays are by continental professors of law or political science and were originally published in German. This is significant because one of the patent reasons for publishing the collection of articles in English was to provide the English-speaking scholar or statesman with the point of view and methodology of his German-speaking colleagues. That goal was achieved. A person with a common law background need only peruse two or three of the essays to note the different style and approach taken by the continental scholar. There is a distinct absence of citation or analysis of cases. Instead, the narratives are highly political in tone, relying on various communiques, official reports, or treaty citations as springboards for analysis and discussion. The hard-core common law jurist would probably find greater satisfaction by reading *The Law of the European Economic Community*, by K. Lipstein, or thumbing through the *Common Market Law Reports*. However, the approach in this collection is refreshing and for those not familiar with European jurisprudence the essays provide some interesting insight into the European approach to constitu-

tional law and its evolution. Professor Nicolaysen's contribution regarding the European Court and Professor Ipsen's article discussing constitutional perspectives of the community process are exemplary. The prospective reader should also be forewarned that the contributing authors assume one to have a general working knowledge of the Community treaties, particularly the Rome Treaties, as well as the various summit communiques, and such items as the Vedel, Werner, and Davignon reports.

In a sense, the book represents the European *Federalist Papers*. It is composed of essays originally written no later than 1972, yet the ability of the book to pinpoint basic problem areas that have become more pronounced in recent years is admirable. Those persons now wrestling with such problems as upgrading the European Commission or injecting more "democracy" in the integration process would do well to read the book.

CHARLES R. JOHNSTON, JR.

Aerial Hijacking as an International Crime. By Nancy Douglas Joyner. Dobbs Ferry: Oceana Publications, Inc.; Leiden: A. W. Sijthoff, 1974. Pp. viii, 344. Index, Appendices, Bibliography, Tables. \$17.50.

The literature on offenses against civil aircraft has generally been directed to *explications de textes* of the relevant conventions, discussions of policy problems, descriptive accounts of exciting episodes in the short history of this area of international criminal law, or to psychological analyses of offenders. In this study, the author has undertaken to examine aircraft hijacking as a distinct international offense and to show by quantitative analysis how states have reacted (up to 1974) to their responsibility for its control. Taking issue with the unfortunate use of "piracy" as the term to describe offenses against civil aircraft, the author succinctly traces the evolution of the traditional offense of piracy upon the high seas involving ships down to the revision of the definition of piracy in Article 15 of the 1958 Geneva Convention on the High Seas by the addition of the use of aircraft in the offense. This definition did not reach the emerging offenses of unlawful interference with aircraft and sabotage directed against aircraft or aircraft facilities which became particularly oppressive in the late 1960's and early 1970's. Efforts to establish international legal controls over these offenses by means of the Tokyo, Hague, and Montreal Conventions are considered with reference to the purpose and scope of the agreements and their treatment of the matter of jurisdiction. It is pointed out, for example, that with regard to state involvement in the Tokyo Convention, statistical data indicate that there was "little causal relationship . . . between the rate of a state's accession and the number of incidents [hijackings] affecting its national interests" (p. 159); some states such as the United States, which was the major victim, were slow to ratify, while others which experienced few or no hijackings moved rapidly to ratification.

The Hague Convention, which delineates the offense of unlawful seizure

of aircraft, is subjected to statistical analysis of state enforcement of its provisions, taking the grant of political asylum, extradition, and prosecution as "dependent variables" which are measured against such "independent variables" as the state of origin of the interrupted flight, state of registration of the aircraft, motive of the offender, or nationality of the offender. It is shown that enforcement has been most effective where the hijacking began and ended in the same state or ended in the state of registration of the aircraft. The statistical analysis also shows that states party to the Tokyo Convention have had a high rate of prosecution or extradition of offenders. On a regional analysis, political asylum is shown to be most commonly granted by Latin American states and, secondly, by Middle Eastern or North African states. In the opinion of the author, "the asylum phenomenon constitutes the most formidable obstacle hindering total prosecution of 'alleged offenders,' and thus reduces the international efficacy to suppress illegal aircraft seizure attempts" (p. 200). Using "Probit" analysis in order to establish bases for predicting the likelihood of state enforcement of the Conventions, it is shown that such "conventions . . . must provide effective control responses for hijacker nationality, motivation of the offender, and success of the incident" (p. 214). Pursuant to this analysis, the author has also found that state commitment to the Hague Convention is a "statistically significant variable in calculating" (*id.*) the response of a state to a hijacking affecting its interests. The author sees the relatively rapid conclusion and acceptance of the three Conventions as evidence of the capacity of the international community for concerted response to an intolerable situation. She is concerned, however, about the "need for internationally legitimized provisions guaranteeing genuine asylum from political persecution (as enumerated in the Universal Declaration of Human Rights), but one which also ensures mandatory extradition or prosecution for all other offenders" (p. 265).

The author has endeavored to break new ground in respect to the study of offenses against civil aircraft by introducing quantitative analysis of available data. Given the somewhat uncertain condition of data concerning aircraft hijacking, sabotage, and extradition and prosecution of offenders, however, there may be some unease in facing these statistical analyses and the conclusions based thereon. The number of instances of extradition seemed high in an area of international criminal law in which exclusion and expulsion are the common methods of recovery of offenders. In considering the purpose of the Hague and Montreal Conventions, the emphasis should be on prosecution, or more correctly, submission of the offender to prosecution, rather than on extradition. The author properly notes the importance of political asylum in any consideration of the enforcement of the punitive conventions, but in so doing she does not discuss the impact of the 1967 Protocol Relating to the Status of Refugees which would be of greater legal impact in this regard than the Universal Declaration of Human Rights on which she relies. The statement that 88 states have "formally sanctioned the deterrent provisions" (p. 215) presumably of

the Hague Convention is unclear; this Convention has 81 signatories but only 76 states were bound by it as of July 1976.

In summary, this study provides an unusual and provocative approach to an important problem as well as a useful point of departure for similar studies of international legal problems.

ALONA E. EVANS

The Law of War and Dubious Weapons. Stockholm International Peace Research Institute. Stockholm: SIPRI; Almqvist & Wiksell, 1976. Pp. viii, 78. Sw. Kr. 47.50.

The first 45 pages of this little brochure are devoted to the task of pinpointing the general principles of the law of war which must be taken into consideration in determining whether a weapon violates the law of war. The remaining 30 pages attempt to apply those general principles to specific weapons. Unfortunately, the reader will at times be confused as to whether the authors (Professor Bert V. A. Röling and Dr. Olga Šuković) are stating that the use of a particular weapon is already illegal or merely that it ought to be made illegal. It must be constantly kept in mind that the authors (and their sponsor, SIPRI) were really directing their findings to the 1976 Session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in Geneva, where the possibility existed (and still exists) that prohibitions on the use of certain conventional weapons, (incendiary weapons, small-calibre high-velocity bullets, fragmentation weapons, and delayed-action weapons) will be included in the several agreements being drafted. Frequently, the authors appear to conclude that a particular weapon in one of these categories violates general principles of the law of war and then recommend that its use be prohibited. On closer examination it becomes apparent that the authors believe that all of the weapons considered by them (and their list is considerably larger than that of the Diplomatic Conference) already violate the general principles of the law of war and are urging that the Diplomatic Conference remove them from the area of dispute by adopting specific prohibitions to be included in agreements to which ratifications and adhesions by all of the members of the world community of nations will be sought.

While the adoption of additional humanitarian rules prohibiting the use of a number of weapons now included in the arsenals of many nations is undoubtedly a goal to be sought, it is completely impractical to attempt to use this procedure as a back door approach to disarmament or to the abolition of war. Fragmentation weapons have been used for centuries without serious dispute as to their legality; now fragmentation weapons are considered by some to violate the general principles of the law of war. Incendiary weapons were widely used during both World War I and World War II and in Korea without serious dispute as to their legality; now incendiary weapons are considered by some to violate the general

principles of the law of war. Booby traps are "perfidious." Mine fields should only be used if they are marked so that the enemy will not blunder into them. Undoubtedly, with a little serious thought, the bow and arrow could be found to violate the general principles of the law of war!

While it may be possible to obtain a two-thirds majority of the Diplomatic Conference to adopt a provision prohibiting the use of practically any weapon, from sticks and stones to the ICBM with a multiple nuclear warhead, any agreement containing such prohibitions will not be ratified by many of the law-abiding nations of the world and will probably be disregarded and violated by many of those nations that do ratify it. Attempting to convert agreements on the humanitarian law of war into disarmament agreements or into agreements abolishing war, as the authors (and some participants at the Diplomatic Conference) are indirectly recommending, can only result in an exercise in futility which will negate the new and valuable humanitarian rules of war adopted by the Diplomatic Conference within the true scope of its mandate.

HOWARD S. LEVIE

Living with Guerrilla: Guerrilla as a Legal Problem and Political Fact. By Edward Kossoy. Geneva: Librairie Droz, 1976. Pp. 405. Sw. Fr. 64.

Guerrilla, as Kossoy defines it, is "an organized resistance movement opposing an established political or social system, government, or authority, or occupying power and striving to overthrow them by the use of violence and any other available means." Resistance movements of this kind have manifested themselves from the earliest times of human history and they will probably continue in the future.

The guerrilla problem is examined essentially in its legal and political aspects. The interpretation of the four requirements laid down in Article 1 of the Hague Regulations Respecting the Laws and Customs of War on Land which are to be followed by militia or volunteer corps in order to be considered lawful belligerents is a flexible one. The author suggests that emphasis be put on the positive meaning of the four rules. While compliance with them will accord protection, noncompliance will not automatically exclude it. Each issue will have to be decided on its merits. Such interpretation may be shared by some contemporary authors; however, it is unlikely to be accepted by the modern professional and military opinion.

The Geneva Conventions of 1949 most certainly widened the scope of the conventional rules directly applicable to guerrillas by including "organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if that territory is occupied."¹ However, the qualifications which accompany that extension are considered to preclude it from being operative.

¹ Art. 4(A)(2), Third Geneva Convention, 75 UNTS.

The work of the Conference on Humanitarian Law, still in progress,² is extensively dealt with and found disappointing. Kossoy strongly feels that the amendment adopted by the First Committee of the Conference which would elevate armed conflicts involving specific liberation movements, *i.e.*, those fighting against colonial and alien occupations and racist regimes, to the status of international armed conflicts is a purely political gesture. Indeed, Kossoy contends that the amendment amounts to an overprivilege for the movements in question in two respects: (1) by discarding the need for some kind of affiliation of these movements with the internationally traditional "Party to the conflict," and (2) by putting offending guerrillas on an equal footing with members of the armed forces of a state. The author is concerned about the tendency to confer preferential treatment on certain categories of participants in armed conflicts.

Only a relatively small number of conflicts can be brought within the scope of the 1949 Geneva Conventions and the additional Protocols. Hence, Kossoy proposes what he calls a Fifth Geneva Convention on Humanitarian Protection of Persons Imprisoned or Detained, which would protect equally participants in guerrilla operations and civilians. A beginning, he suggests, could be made on the regional basis, which could accommodate local customs and ideological conceptions of human rights.

The book is useful in that it considers concepts of guerrilla warfare in non-Western civilizations and is not limited to any particular liberation movement. On the other hand, the author allows himself to be diverted by peripheral issues. This perhaps is due to his desire to consider legal along with political aspects of the problem.³

CHRISTIANE SHIELDS DELESSERT

Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations. By Eileen Denza. Dobbs Ferry: Oceana Publications, Inc.; London: The British Institute of International and Comparative Law, 1976. Pp. viii, 348. Indexes. \$22.50.

The author, a lawyer at the British Foreign and Commonwealth Office, has produced an excellent guide to the law of diplomatic intercourse as laid down in the 1961 Vienna Convention. The book is in the convenient form of an article-by-article commentary on the Convention. For each article, Denza begins with a succinct account of the nature and historical development of international law as it existed before the Convention. The *travaux préparatoires* and proceedings of the Vienna Conference are then summarized, followed by an analysis of controversial or unclear aspects of the

² The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, called by the Swiss Government, opened its first session in Geneva on February 20, 1974. Its fourth session will be held in Geneva in April 1977.

³ For another recent and different study on the matter, see MICHEL VEUTHEY, *GUERRILLA ET DROIT HUMAINITAIRE* (1976), Collection scientifique de l'Institut Henry Dunant.

article in question. This last and usually most valuable portion of the comment draws on relevant judicial decisions and state practice, principally that of the United Kingdom, up to about 1973.

This format naturally limits the attention which the author is able to give to broader conceptual aspects of the Convention and of diplomatic law—for example, the exact nature of the concept of inviolability, a term frequently and not always consistently used in the Convention. At the same time, the book is admirably adapted to the needs of diplomats, their legal advisers, and practicing lawyers who require a well-written practical guide to the legal aspects of diplomatic relations governed by the Convention.

Like the Convention itself, Denza's commentary occasionally seems a little cloistered from the world of the 1970's, when diplomats are as apt to find themselves keeping watch over a military truce line (no fewer than 27 U.S. Foreign Service personnel are now assigned to the Sinai Field Mission), administering a community development program, or running a trade center, as performing the traditional functions listed in Article 3 of the Convention. Thus, it is a little surprising to learn that an ambassador's right of direct access to the head of state "is of no political importance now that business is . . . conducted through the Ministry of Foreign Affairs" (p. 59). Few ambassadors in Washington or Paris would agree, to say nothing of those accredited to any of the depressingly large number of one-man tyrannies which continue to flourish. Nor would one discern from Article 24 of the Convention (inviolability of archives and documents), or Denza's commentary upon it, that many states devote substantial resources to attempts to pry into each other's diplomatic communications. Some additional material on the practice of states, especially the United States and representative developing countries, would have reduced this slightly academic flavor and enhanced the value of the book.

PAUL J. BENNETT

The Irish Triangle. Conflict in Northern Ireland. By Roger H. Hull. Princeton: Princeton University Press, 1976. Pp. ix, 312. Index. \$15.

Northern Ireland. Time of Choice. By Richard Rose. Washington: American Enterprise Institute for Public Policy Research, 1976. Pp. viii, 175. \$3.75.

Northern Ireland is Europe's Cyprus, a graveyard of people and political solutions. Scholars who address policy-oriented inquiry to that tragic territory must at the very least be commended for their undaunted faith in their relevance to the creation of political solutions. Richard Rose systematically reviews the history and context of the dispute with great attention given to internal political processes. His analysis leads him to conclude that there is no solution, only alternative methods of coping, one being destruction or self-destruction of that troubled community.

Roger Hull has written a book which rambles more widely but concludes with a detailed set of solutions. His constitutional and international legal analyses are somewhat mechanical. For example, Hull concludes his review of the constitutional position by finding that "Ulster is part of the United Kingdom." The relevance of such statements in situations of civil strife is puzzling. Suppose indeed that Algeria "was" constitutionally part of France, Angola part of Portugal, and so on. Civil strife by definition involves situations in which those opposed to the established order have achieved a power position effective enough to challenge the order: either to destroy it, be destroyed, or to participate in some transformation. But Hull's concrete recommendations are arresting. His case on the inappropriateness of humanitarian intervention, despite available legal arguments, is persuasive. Hull believes that wide-ranging equalization of civil rights will reduce terrorism and that this can be effected by legal fiat. He suggests that the interposition of a European or NATO peacekeeping force in certain possible transitions can fulfill, less provocatively and more effectively, many of the functions performed by the British.

The 20th century has seen little if any abatement of those group hatreds which are so intense that they seem to be genetic of the culture and political organization of the group and the personalities of group members themselves. Perhaps it is more than poetic that a movement such as the women's peace organization in Northern Ireland (which has flourished only after the appearance of these books) now undertakes to create a new Irish consciousness.

MICHAEL REISMAN

Cyprus: The Vulnerable Republic. By Dimitri S. Bitsios. Thessaloniki: Institute for Balkan Studies, 1975. Pp. 223. Index.

The importance of this book goes far beyond its title. It deals with international affairs in relation to the rule of law, including the law of the UN Charter.

As an expert on a subject, the author's credentials are impressive. Long before he became the present Minister of Foreign Affairs of Greece, he was dealing with the Cyprus issue; even before 1957 when he headed the Cyprus desk in the Ministry. And for ten years he was Greece's Permanent Representative to the United Nations where he took a most active part in its deliberations on the problem.

The volume begins with four questions which Bitsios addressed to Alessandro Alvarez, Chilean professor of international law, in June 1958, "Have the Turks, as they pretend, the right to claim separate self-determination in the case of Cyprus? Are the Turkish Cypriots a 'separate people'? Can they decide by themselves the future status of the island, disregarding the wishes of the great majority [80%]? Is there such a precedent in the records of history?" Professor Alvarez's written opinion was: "No argument can justify the Turkish claim. The people of Cyprus will express

its opinion in its entirety, as a whole, and the political future of Cyprus will be determined by the will of the majority."

Opening with the 1951 Anglo-Greek discussions and their consequences, the narrative proceeds to February 1957, when the Cyprus question was first taken up by the United Nations. The General Assembly adopted Resolution (1013)(XI) expressing its desire that the problem be solved "in accordance with the purposes and principles of the Charter of the United Nations" and that negotiations be continued to this end. Renewed Anglo-Greek dialogues and UN developments were followed by the Zurich agreement of Greece and Turkey for an independent Cyprus Republic and confirmation of the plan a few days later, February 19, 1959, by the London five-party conference.

Part Two of the work covers, *inter alia*, the resolution of March 3, 1964, by which the UN Security Council, upholding the independence, sovereignty, and territorial integrity of Cyprus, decided to send a peacekeeping force there and asked the UN Secretary-General, U Thant, to appoint a Mediator. The resolution was implemented.

On March 12, the Turkish Representative informed U Thant that Turkey intended to resort to military intervention to protect alleged violations of treaty rights of Turkish Cypriots. In August 1964, Turkey bombed the island, following skirmishes at Mansoura. At an emergency meeting of the UN Security Council on August 9, Mr. Bitsios, as Greek Representative, delivered the first ultimatum in the history of the United Nations. At noon, he said that, if Turkish bombing did not cease by three in the afternoon, Greece would assist Cyprus with all military forces. The Council adopted a resolution requesting Turkey to stop its military action and the Cypriots to stop fighting at Mansoura.

The book closes with events in 1974 when, on July 20, an invasion by 35,000 Turkish armed forces began the dismemberment of Cyprus that led to the occupation of forty percent of that republic.

On October 21, the author, addressing the UN General Assembly, called its attention to the invasion in spite of the fact that, in the Lausanne Treaty of 1923, Turkey had formally renounced all its claims. Mindful of law and the UN Charter outlawry of the use of force, he proposed that, in order to ensure the survival of Cyprus as an independent state, the United Nations adopt a resolution containing the following three points: (1) withdrawal of all foreign forces from Cyprus; (2) cessation of all outside intervention in its affairs; and (3) return of the refugees to their homes. A few days later, the UN General Assembly unanimously passed a resolution incorporating those three points.

Only a reading of the book itself could give an adequate idea of the legal and political Gordian knots which a consummate diplomat unravels with scholarly perspicacity. The author probes the essence of the complexities of the problem with intimate knowledge and understanding. The volume is of interest to all concerned with the rule of law and peace.

JOHN MAKTOΣ

Chung-hua jen-min kung-ho-kuo t'iao-yueh chi (Compilation of Treaties of the People's Republic of China). Vols. 15, 17, and 18. *Chung-hua jen-min kung-ho-kuo wai-chiao-pu* (Ministry of Foreign Affairs of the People's Republic of China) (ed.). Peking: Jen-min ch'u-pan she, (Vol. 15), 1974; (Vols. 17 and 18), 1973.

Since the outbreak of the Cultural Revolution in 1966, virtually no scholarly writings on international law have appeared in the People's Republic of China (PRC). Similarly, the two important official publications on international law—*Compilation of Treaties of the PRC* and *Compilation of Documents relating to Foreign Relations of the PRC*¹—also seemed to have been discontinued in the mid-1960's. The first thirteen volumes of the *Compilation* were reviewed by this reviewer in 1967,² and the volumes now under review are a continuation of the earlier volumes. They contain treaties concluded between 1966 and 1967 (Vol. 15), in 1970 (Vol. 17), and in 1971 (Vol. 18). It is not clear whether the PRC has published Volume 14 (which would cover the year 1965) and Volume 16 (which would cover the period 1968–69). Since Volumes 17 and 18 were published before Volume 15, it is possible that Volumes 14 and 16 have not yet been published.³

The format of these volumes is generally the same as in the earlier volumes. In each volume, bilateral treaties are classified as political, economic, cultural, sanitary and health, agricultural, communications and transportation, and others. Multilateral treaties, which previously were classified together with bilateral treaties, are now listed at the end of the volume. As in the earlier volumes, some important agreements concluded by the PRC's semiofficial organizations (such as China Sino-Japanese Memorandum Trade Office) are included in the appendix of the *Compilation* (such agreements are hereinafter referred to as "semiofficial agreements"). Communiqués establishing diplomatic relations between the PRC and other countries, which were not included in the earlier volumes, are now included in Volumes 17 and 18. As in the earlier volumes, each volume has a chronological index of all the treaties contained in that volume.

Included in the three volumes under review are 180 bilateral treaties, one multilateral treaty, and seven semiofficial agreements. Tables 1 and 2 indicate the range of the PRC's treaty activities in 1966, 1967, 1970, and 1971 (* indicates semiofficial agreements and ** indicates communiqués establishing diplomatic relations).

Some documents included in the *Compilations* are not treaties or agreements in the strict sense. For example, most countries do not include in

¹CHUNG-HUA JEN-MIN KUNG-HO KUO TUI-WAI KUAN-HSI WEN-CHIEN-CHI, Peking: Shih-chieh chih-shih ch'u-pan she (1957–1965). Up to 1965, ten volumes had been published covering the years 1949–1963. According to my knowledge, this collection of documents has not yet resumed publication.

² 61 AJIL 1095 (1967).

³ The reviewer has checked major libraries, including libraries in the Republic of China (Taiwan), Japan, the United States, and the Dag Hammarskjöld Library at the United Nations, and still cannot find these two volumes.

TABLE 1

TYPES OF TREATIES CONCLUDED BY THE PRC IN 1966, 1967, 1970, AND 1971
(The classification is the same as the classification used in the Compilation)

	1966	1967	1970	1971	TOTAL
POLITICAL (1) Friendship					
(2) Joint Communiqué	1	2	5**	4; 13**	25
(3) Others	2			1***; 3*	6
LEGAL (1) Consular Relations					
(2) Nationality					
BOUNDARY PROBLEMS (Use of boundary rivers, etc.)			1		1
ECONOMIC (1) Commerce and Navigation				1	1
(2) Economic aid, loan and technical cooperation		1	2	1	4
(3) Trade and payment	33	21	19	34	107
(4) General conditions for delivery of goods	4	4	4	3	15
(5) Registration of trademark					
(6) Others	1††		1*		2
CULTURAL (1) Cultural Cooperation		1			1
(2) Broadcasting and TV cooperation	2			1	3
(3) Exchange of students					
(4) Others					
SCIENCE AND TECHNOLOGY	1	1			2
AGRICULTURE AND FOREST	1				1
FISHERY			3*		3
HEALTH AND SANITATION		3	2		5
POSTAL AND TELECOMMUNICATION				2	2
COMMUNICATION AND TRANSPORTATION					
(1) Railways					
(2) Air transportation	6				6
(3) Water transportation	1			2	3
(4) Highway					
LAW OF WAR					
MILITARY					
MULTILATERAL		1			1
TOTAL	52	34	37	65	188

† Protocol establishing consular relations between the PRC and San Marino, May 5, 1971.

†† Economic and cultural cooperation agreement between the PRC and Cambodia, April 29, 1966.

their treaty collections many of the communiqués contained in the Compilations.

In the table of contents listing the names of the countries, the treatment of East Germany is very interesting. In previous volumes, treaties concluded with East Germany were usually grouped under the title Germany (Te-kuo),⁴ "Democratic Germany" (Min-chu te-kuo),⁵ or "German Democratic Republic" (Te-i-chih-min-chu kung-ho-kuo).⁶ However, in Volumes

⁴ 4 COMPILATION OF TREATIES, table of contents, at 1 (1955).

⁵ 12 *id.*, table of contents, at 7 (1963).

⁶ 13 *id.*, table of contents, at 7 (1964).

TABLE 2
NUMBER OF BILATERAL TREATIES CONCLUDED BY THE PRC
IN 1966, 1967, 1970, AND 1971

COUNTRY	1966	1967	1970	1971	TOTAL
AFGHANISTAN	1				1
ALBANIA	2	1	1		4
ALGERIA			3		6
AUSTRIA				3	1
BELGIUM				1**	1
BULGARIA	1		1	1	3
BURMA	5	1		1	7
CAMBODIA	1				1
CAMEROON				1**	1
CANADA			1**		1
CEYLON	1	2	1	3	7
CHILE			1**		1
CONGO (B)		1			1
CUBA	2	1			3
CYPRUS				1**	1
CZECHOSLOVAKIA	1	1	2	2	6
EQUATORIAL GUINEA			1**		1
ETHIOPIA			1**	1	2
FINLAND		1	1	2	4
FRANCE	1				1
GERMANY (East)	4	1	2	1	8
GUINEA	3	1		1	5
HUNGARY	2	2	2	2	8
ICELAND				1**	1
IRAN				1**	1
IRAQ	1				1
ITALY			1**	1	2
JAPAN			4*	3*	7
KOREA (North)	4	1	4	6	15
KUWAIT				1**	1
LEBANON				1**	1
MALI		2			2
MAURITANIA		4			4
MONGOLIA	2	1	1	1	5
MOROCCO	2			1	3
NEPAL	2				2
NIGERIA				1**	1
PAKISTAN	2				2
PERU				3; 1**	4
POLAND	2	2	3	3	10
ROMANIA		4	3	4	11
RWANDA				1**	1
SAN MARINO				1**†	1
SIERRA LEONE				2; 1**	3
SENEGAL				1**	1
SOVIET UNION	4	1	2	1	8
SUDAN	2		1	1	4
TURKEY				1**	1
UNITED ARAB REPUBLIC (Egypt)	1	1		4	6
VIETNAM (North)	5	4	1	3	13
YUGOSLAVIA	1	1			2
TOTAL	52	33	37	65	188

† Protocol establishing consular relations between the two countries. May 5, 1971.

15 and 18, that country is referred to as "East Germany" (Tung-te),⁷ a form used commonly by Western countries but disliked by the East German authorities. This way of listing East Germany may indicate the PRC's dis-

⁷ 15 *id.*, table of contents, at 7 (1966-67) and 18 *id.*, table of contents, at 9 (1971). However, in Volume 17 East Germany was referred to as the "German Democratic Republic" (*id.*, table of contents at 6 (1970)).

pleasure with that country's siding with the Soviet Union in the Sino-Soviet dispute.

Needless to say, resumption of publication of the PRC Compilation of Treaties is good news for scholars and government officials interested in the PRC's foreign policy and treaty relations.

HUNGDAH CHIU

BRIEFER NOTICES

The Constitution and the Conduct of Foreign Policy. Edited by Francis O. Wilcox and Richard A. Frank. (New York, Washington, and London: Praeger Publishers, 1976. Pp. xiv, 145. Index. \$14.00, cloth; \$4.95, paper.) This book emerges from the extended consideration by a panel of experts of the various issues that are fundamental to the current debate over the distribution of power to conduct the foreign affairs of the United States. The panel of 39, drawn from the law, the universities, and public life, met under the auspices of the American Society of International Law. It examined the ways in which the process of forming American foreign policy could become more open, how the imbalance of power between the two concerned branches of the U.S. Government in this field could be redressed, and how to assure that decisions taken in the name of the United States were indeed based on the support of the American public.

The panel considered the reform of present practice under four main headings: the first deals with appropriate alteration of the current method by which the government restricts access to information essential to decisionmaking; the second has to do with ways in which the public can be brought closer to the decisionmaking process; a third reform would lay greater restraints than now exist on the President's power to commit American forces to combat; and the fourth would restrain the President's power to commit the United States by means of agreements entered into with other countries.

Dr. Wilcox (who chaired the panel) contributes a thoughtful preface which looks at the issues from the special vantage point of Capitol Hill. It is followed by the panel's "principles and recommendations" for accomplishing the needed reforms and five essays by members of the panel expounding on each of the areas considered.

The special dilemma of trying to reconcile the admittedly indispensable need for secrecy in the conduct of some aspects of foreign affairs and the public's right to have access to information on which decisions are to be based is the subject of two essays. One, by Professor Futterman, looks at the question mostly in its legal aspects. The other, by George Reedy, stresses the impossibility of pursuing a successful foreign policy without a national commitment, and asks whether "any breach of national security can be more harmful to a nation than a basic and pervasive loss of confidence in the nation's leaders."

This book is a valuable and practical contribution to the continuing study of how, under the American Constitutional arrangements, the conduct of American foreign policy can be made to suit public expectations that its representatives will reflect the popular will.

ALFRED G. VIGDERMAN

Die Vereinten Nationen im Wandel. Referate und Diskussionen eines Symposiums "Entwicklungslinien der Praxis der Vereinten Nationen in völkerrechtlicher Sicht" veranstaltet aus Anlass des 60 jährigen Bestehens des Instituts für Internationales Recht an der Universität Kiel 20.-23. November 1974. Edited by Wilhelm A. Kewenig. (Berlin: Duncker & Humblot, 1975. Pp. 262. DM 68.) Two factors prompted selection of the United Nations as the theme of the symposium commemorating the sixtieth anniversary of the Institute of International Law at Kiel. The first stemmed from the longtime concern which the Institute has had with international organizations, particularly the League of Nations and the United Nations; the second was motivated by the gap which exists in German literature about the work of the United Nations, a hiatus which has become all the more noticeable since the admission of the Federal Republic to the Organization. Thus four papers, which occupy approximately one-half of the book, were presented and discussed at the symposium which was attended by some forty scholars, the vast majority of them from German universities. The topics considered range from collective economic security to collective military security, and include a study of the development of international law by the United Nations and an examination of the changing functions and structure of the Organization. Each of these subjects was carefully analyzed by the four spokesmen, who did not hesitate to advance controversial points of view which were vividly debated by the participants of the colloquium. For example, one article strongly criticizes the Charter of Economic Rights and Duties of States which the General Assembly adopted on December 12, 1974, but which had not been approved at the time of the meetings. The conclusion is drawn that the Charter is counterproductive and will result in greater impoverishment of the less developed countries. Similarly, recent decisions of the International Court of Justice are attacked and described as part of the "South West Africa syndrome." Regret is expressed at the tendency to make the Court a political or a more political organ. In another report the position is taken that the UN Charter employs the term "peace" in a dual sense. On the one hand, it is said to apply to the narrow concept of peace and security or to the absence of war. On the other, it is said to refer to the wider notion of universal peace as described in Article 1(2) or to the peaceful and friendly relations embodied in Article 55, with the charge that the General Assembly has shifted its emphasis to the latter concept.

Examination of the volume shows that the objectives of the organizers of the symposium were well realized. Several of the more important purposes, functions, and modifications of the Organization were carefully considered and enough controversy was aroused to stimulate further discussion and analysis.

GUENTER WEISSBERG

Die Sicherung des Weltfriedens durch die Vereinten Nationen. By Detlev Christian Dicke and Hans-Werner Rengeling. (Baden-Baden: Nomos Verlagsgesellschaft, 1976. Pp. 193. DM 49.) This volume surveys the manner in which the United Nations seeks to maintain international peace and security through an examination of the several UN organs concerned with this task. After certain general observations, the appropriate articles of the Charter, and more specifically those pertaining to the Security Council, General Assembly, and Secretary-General, are considered. An additional chapter is devoted to the inactive Interim Committee, the so-called "Little Assembly." In the final section consideration is given to the West Irian conflict between the Netherlands and Indonesia to illustrate

the effective work of the United Nations in the field of peacekeeping. Actually that particular conflict and its solution, while accomplishing the desired results, are atypical. Although aware of this fact, the authors employ this case to show that the United Nations can secure international peace. But does an exception to a general rule really evidence the rule, especially if it is acknowledged that in this instance political conditions existed which made a settlement feasible? Aware of this dilemma, the positive is accentuated by noting that the controversy shows the major role which the Secretary-General played and the political significance of his action for his office. This, however, merely deals with another facet of the same basic issue, namely, the paramount interests of the major powers, and particularly the superpowers. Without their cooperation and consent, explicit or tacit, the Secretary-General cannot function, as more than one incumbent has learned, and the Organization cannot operate in an effective and meaningful fashion.

Nonetheless this book is a valuable addition to the literature. The authors' basically sound analysis of the Charter provisions is most welcome, all the more so because it is in the German language. It is only regrettable that outside of the West Irian case illustrations are lacking to show the application or misapplication of the various Charter provisions during some thirty years of practice. But this aspect would have been outside of the realm of the study and beyond the scope of the authors' framework.

GUENTER WEISSBERG

Reprisals. Rituals, Rules, Rationales. By Nicholas G. Onuf. (Center of International Studies, Princeton University, Research Monograph No. 42, 1974. Pp. 63. \$4.00.) Professor Onuf's essay does not deal with reprisals and their legal framework in general but with what he calls "reprisals-series," i.e., "retaliatory acts that have given rise to retaliatory acts in a potentially infinite series" (p. 8). The Arab-Israeli reprisals activity serves as the principal illustration.

In the first part of the study, the author tries to provide new insights into the functions and conditions of reprisals by using certain findings of sociology, social psychology, and anthropology. In the second part the Arab-Israeli "reprisals-series" are evaluated from the international legal point of view. Professor Onuf focuses his attention on the coexistence of legal prohibitions on military reprisals and the practice of the Security Council affirming their use under certain conditions. After reviewing some doctrinal solutions, the author finds that this practice is compatible with his view of international law by assuming that reprisals-series, if their actors only follow a certain ritual and a body of both interaction and institutive rules, are permitted despite the clear prohibition in the Charter: "In effect the norms of a reprisals-series enjoy a localized cogency or peremptory character excepting the series from concrete prohibitions on the use of force that might otherwise obtain" (p. 61 f).

Onuf's view might be of marginal comfort to states that have decided to slug it out with their antagonists, whatever the law may say. Aside from that, however, it is unacceptable *de lege lata* as well as *de lege ferenda*. The Security Council failed to condemn unambiguously the Arab-Israeli "reprisals-series" due to the veto-rattling of the antagonists' respective Big Brothers and not because it actually accepted these exchanges as a legally justified safety valve for relieving international tension. It is depressing to watch some scholars spare no doctrinal pains legitimizing and legalizing

state behavior in order to avoid the conclusion that what we have to observe in some quarters might be "violations-series" of international law.

As to the sources used, reference to more non-American material would not have lowered the overall quality of Professor Onuf's work.¹

BRUNO SIMMA

International Tax Treaties of All Nations, Vol. I. By Walter H. Diamond and Dorothy B. Diamond. (Dobbs Ferry: Oceana Publications, Inc., 1975. Pp. 565. \$50.) This is the first volume of a ten-volume series which reproduces the text of 908 treaties on tax matters. The publisher promises additional volumes at three-month intervals. Each contains nothing more than a reprint of texts from the League of Nations and the United Nations Treaty Series. It should not be difficult for the authors to meet this schedule. In the introduction, the authors explain that they have reprinted the treaties because "it has been difficult if not virtually impossible" to obtain full sets of the published series. The alleged goal of this retrieval service is to provide a reference work that is as easy to use as a dictionary. Developments in the international tax field are not covered, nor is there any analysis or commentary on the texts. Henry Bloch and Karl Lachmann of the UN Fiscal and Financial Branch began the UN series in 1950. The value of these "impeccable" translations of international tax agreements and their continual publication and updating by the United Nations has never been properly acknowledged. Perhaps these reprints will draw attention to the great work which they have done.

The table of contents and the index identify the type of treaty by letters A to S, a subject-matter classification which allows the reader to see at a glance that most deal with income taxes; shipping taxes, and succession taxes. The short paragraphs preceding each reprinted treaty supposedly annotating, summarizing, or clarifying the agreement are singularly inadequate and terse. The present volume does not add any information to the already published series. It does not deviate in any significant manner from the format, the order, or the content of the League and United Nations Series. At first glance, the reader may find the cumulative looseleaf index an important innovation only to discover that it is not an index of the provisions of the treaties but only a list of page numbers of the various treaties which each country has entered into. None of the standard terms such as "permanent establishment" or "competent authority" are indexed to the page or article of treaties in which these terms are used. International tax experts familiar with the UN publications will experience a sinking feeling when they first examine this volume. However, the convenience of having all the treaties within easy reach may compensate for the disappointment.

WILLIAM S. BARNES

Taxation of Real Property (in Greek). By Athanasios D. Paroutsos. (Athens: Aristotle Editions, 1976. Bibliography. Index.) The author is a counselor at law who has published other books, including one on international aspects of Greek taxation of inherited property. Although devoted primarily to Greek domestic law regarding taxation of real property, this volume also contains relevant aspects of international law and practice.

¹ Cf. 23 INTERNATIONAL ORGANIZATION 100 (1969).

Specific legal provisions exempt from taxation, on the basis of reciprocity, real property owned by a foreign state for its embassy or consulate. This does not mean that the foreign state must grant exemption by legislation. It suffices if this immunity is extended in fact. Real property owned by a foreign state for commercial purposes is taxed. Again on the basis of reciprocity, diplomatic envoys and agents are immune from tax on property used by them for noncommercial purposes. Thus, the residence of such persons would not be subject to tax.

Tax exemption is also granted to real property of consuls, consular agents, and the lower echelons of embassies and consulates subject to the following conditions: (1) reciprocity, (2) citizenship of the sending state by the said persons, (3) no commercial enterprises or offices in them, (4) no conflicting treaty provisions, (5) use of the property only as a result of the official positions of the said persons. Another international aspect of the book relates to the tax exemption of real property of religions recognized in Greece if used for their ecclesiastical rites only.

The remainder of this volume is, as stated above, concerned primarily with domestic law. So far as I know, it is the only scholarly treatise on the subject in Greek. It is especially valuable for lawyers, judges, businessmen, and other students of Greek taxation.

JOHN MAKOTOS

The Politics of International Monetary Reform: The Exchange Crisis. By Michael J. Brenner. (Cambridge, Mass.: Ballinger Publishing Co., 1976. Pp. xiii, 144. Index. \$13.50.) This book chronicles events that led to the exchange crisis in the early 1970's, and the crisis itself, from the point of view of political, psychological, and, on occasion, emotional factors which motivated leading monetary authorities concerned with meeting the crisis. A prodigious amount of research was undertaken by the author, an authority on political science. The book makes an important contribution to the literature on recent monetary developments of interest to academia and the public at large. For the practitioner, the principal benefit is its potential use as a reference regarding what was thought and said by the various protagonists in the course of the crisis, as well as when, why, and how they reacted.

The book analyzes in depth the problems that countries faced in adhering to the international legal obligations to defend the fixed exchange rate system embodied in the Bretton Woods system. It also analyzes in depth the obligations inherent in a system which contains no well-defined international legal obligations. A cardinal point made toward the end of the book is the need for the establishment of institutional arrangements to coordinate the economies of the leading countries. The point is well taken. Indeed, a large measure of consensus has been reached among the monetary authorities during their extended consideration of reform of the international monetary system. There is general agreement among both those who upheld a fixed-rate system and those favoring floating rates that under either system or a combination of the two a large measure of coordination of monetary and economic policies must be attained among leading countries.

The International Monetary Fund is preparing new rules of conduct for the reformed system. These will be a set of principles to give members

guidance in the conduct of their monetary policies. The test of the efficacy of these new rules of the game will be how well they are designed to meet the problems that have been spelled out in this book.

ALBERT S. GERSTEIN

Science, Technology, and Diplomacy in the Age of Interdependence. Prepared for the Subcommittee on International Security and Scientific Affairs of the Committee on International Relations, U.S. House of Representatives, by the Congressional Research Service, Library of Congress. (Washington, D.C., 1976. Pp. xxi, 492.) It is particularly significant to the growing appreciation of diplomatic affairs in the United States that the House of Representatives, which under the U.S. Constitution has no direct functional role in American diplomatic negotiations similar to that of the Senate, should look into the depth and pervasiveness of the place occupied by science and technology in American foreign relations. This volume is indicative of a growing congressional role in foreign policy fields that are still not in the eyes of many within the scope of foreign relations.

The motive behind this work was a conviction that the influence of science and technology on international life, both in peacetime and wartime, had not been sufficiently evaluated. The decision of the UN General Assembly in 1975 to convene an international conference on science gave an added impulse to the intensive study undertaken by the House of Representatives. This volume is a valuable historical record of both problems and American initiatives and involvements in what may be called techno-science diplomacy. More specifically it examines certain issues involving the interaction of science and technology with political, economic, and defense policies and suggests more integrated international objectives on the part of the United States.

Subjected to scrutiny are the following six cases: The Baruch Plan of 1946 to internationalize the control of atomic energy; the American initiative in proposing international controls for peaceful uses of atomic energy ("Atoms for Peace," 1953); the International Geophysical Year (1957-1958) for the gathering of physical data; the Mekong project of intensive regional development in the southeast part of Asia; the question, in terms both of international law and technology, of the exploitation of the seabed; and the comprehensive trading agreements between the United States and the Soviet Union (1972), including the American notion of influencing the USSR to redirect its technology to consumer, rather than to military, goods. Within the larger context of the six great issues to which the study addressed itself, several other areas were examined, such as the "food/people equation"; the international mobility of scientific and technological personnel; worldwide health problems; and the role of nongovernmental agencies in governmental projects.

It is not uninteresting that the directors of the present study should call for a "sense of the sweep of historical change" among diplomats, since scientists and technologists are only grudgingly credited with a sense of history. An extremely useful bibliography by subject (law of the sea, the Stockholm Conference of 1972, the "brain drain," etc.) concludes this paperback.

ALBERT NORMAN

International Protection of the Environment. Treaties and Related Documents, Vols. II-VI. Compiled and edited by Bernd Rüster and Bruno Simma. (Dobbs Ferry: Oceana Publications, Inc., 1975 and 1976. Pp. 490-3074. \$40 per volume.) Volumes II through VI of this series have now been published and, in terms of the abundance and relevance of the materials included, have fully lived up to the expectations and standards created by Volume I.¹ The five books contain documents and records, some in their entirety and some selectively excerpted, arranged in three categories: Agreements and Related Documents, Acts (Resolutions) of International Organizations and Conferences, and Municipal Legislation. These categories are repeated as each topic is addressed, with Volumes II and III completing the marine pollution materials begun in Volume I, Volumes IV and V covering protection of fauna and flora on land, and Volume VI beginning the detailed coverage of conservation of the living resources of the sea.

A survey of the materials included will not be attempted here; for the scope of each of the categories presented is for most practical purposes virtually exhaustive. This fact, however, points up several issues. First, there is no Municipal Legislation category in either the general section or the section on the protection of fauna and flora on land; certainly there are numerous possibilities for profitable inclusion in each. Secondly, the tables of contents are less than adequate in terms of coverage. As some of the materials are not placed in chronological order, it is sometimes necessary to search for a desired document. The tables contain some annoying errors of juxtaposition and superfluous words. The editors have provided a gold mine of information, but until the publication of the anticipated index volume we are without the tool to exploit it to its full.

PETER ALAN THOMAS

Mezhdunarodnoe pravo. Bibliografiia 1917-1972 gg. Edited by D. I. Fel'dman. (Moscow: Iuridicheskaiia literatura, 1976. Pp. 600. 1 ruble, 97 kopecks.) The present volume is an extensively revised, enlarged, and updated bibliography of Soviet literature on international law which replaces, but does not wholly supersede, an earlier retrospective compilation for the period 1917-57 edited by V. N. Durdenevskii.¹ The earlier version quickly went out of print, and many libraries were able to acquire only a two-volume German version updated to 1962.²

In a brief preface Professor Fel'dman reviews the importance of retrospective bibliography for international legal research and welcomes the increasing disposition of such publications as Harvard's *Annual Legal Bibliography* and the *Index to Foreign Legal Periodicals* to register Soviet writings. And he notes that since 1959 both the numbers of Soviet jurists working in international law and the amount of materials published have expanded impressively.

On the whole, the 1976 version is a welcome improvement, and the editors were surely correct to prepare a new edition for the entire period

¹ See 70 AJIL 405.

² V. N. DURDENEVSKII, SOVETSKAIA LITERATURA PO MEZHDUNARODNOMU PRAVU. BIBLIOGRAFIIA 1917-1957 (1959).

³ B. MEISSNER (intro.), SOWJETUNION UND VÖLKERRECHT 1917 BIS 1962 (1963); A. USCHAKOW (intro.), DAS SOWJETISCHE INTERNATIONALE PRIVATRECHT 1917 BIS 1962 (1964).

rather than merely a supplement to the 1959 edition. This has allowed the inclusion of materials previously omitted, such as works by Soviet jurists published abroad; foreign reviews of Soviet works, and Soviet syllabi on public and private international law. The classification scheme has been extensively reworked and allows for a more detailed breakdown of material, especially in such areas as the law of the sea, space law, foreign relations law, and international organizations. The Soviet-American negotiations of 1972 even merit a special rubric under the peaceful coexistence section. Works issued in the languages of other union republics also are included in this edition. There is an author index. Omitted are materials not relating directly to international law and references to individual documents published in journals; for reference to these libraries will wish to retain the first edition.

Improved as this edition is, there is more that might have been done. The books and articles by Soviet international lawyers in translation abroad and reviews of Soviet works in Western journals are still vastly underrepresented in this compilation. The editors evidently were unaware of several standard bibliographies and indexes which could have assisted them in this connection. Some entries in the 1959 edition which do fall within the scope of this edition were overlooked; *e.g.*, Gorovtsev's 1920 outline syllabus. But this is nonetheless a fundamental reference work essential for all libraries of international law and relations.

W. E. BUTLER

The Canadian Yearbook of International Law. Vol. XIII, 1975. Edited by C. B. Bourne. (Vancouver: The University of British Columbia Press, 1976. Pp. x, 465. Index. \$18.) This volume includes a selection of eight articles, most of which will be of some interest to general readers as well as to specialists.

Two articles of human rights interest concern Canada and the refugee in international law and the transnational protection of ethnic minorities. The former offers a readable survey of the history of the refugee question and the evolution of Canada's refugee policy. The latter article concerns the establishment of a "tentative framework for inquiry" and attempts to identify the minority problem, the demands of ethnic groups, and some of the relevant policy questions.

Two articles focus on issues of economic interest: the law of external relations between the European Economic Community and Canada and an extensive study of GATT and the problem of state enterprises in countries with a free market economy, specifically the case of the provincial liquor monopolies in Canada.

Three articles concern timely questions of international environmental law and ocean usage. A study of international liability for the pollution of international watercourses concludes that state responsibility for this form of pollution must be grounded in several diverse elements. These elements include particularly extraterritorial damage and attribution to a state of the activity causing damage. A second study treats the general principles of law on the protection of coastal states against the pollution of navigable waters, and a third examines Canada's role vis-à-vis seabed arms control.

The final article is a continuation of a historical review of the teaching of international law in Canada, which this reviewer commented favorably upon in an earlier review appearing in this journal.¹

As usual, the *Yearbook* offers an interesting selection of notes and comments. This volume includes an evaluation of proposals for a deep seabed regime, comments on the 1975 session of the Geneva Conference on International Humanitarian Law, the legal status of Namibia, and the annual conference of the Canadian Council on International Law. Other regular and valuable features of the *Yearbook* include a review of current Canadian practice in international law, a digest of important Canadian cases in public international law and conflict of laws, and a book review section.

FOREST L. GRIEVES

The Law of the Near and Middle East: Readings, Cases and Materials. By Herbert J. Liebesny. (Albany: State University Press of New York, 1975. Pp. xii, 316.) The region called the Near and Middle East forms but part of the larger area, often known as the "Islamic World," which extends from the Atlantic to the Indian Ocean and beyond. Dr. Liebesny is therefore right in devoting the first two chapters of his book to the nature and sources of Islamic law and to some aspects of its development in the classical period. However, Islamic law has undergone considerable changes under the impact of Western culture and political pressures, especially during the nineteenth and twentieth centuries. Two chapters (Chaps. 3-4) deal with the changes in the law from the mid-nineteenth century to the postwar years. Chapter five discusses the interesting subject of the so-called Anglo-Muhammadan law, a law combining Islamic legal material and a Western form of law forged in the Indian subcontinent to meet the needs of a Muslim community that had lived under the imperial rule of a Christian power.

The second part of the book, comprising seven chapters, is a systematic study of the law of personal status, property and contract, and penal law. The last two chapters are devoted to procedure and judicial organization as they developed from the classical to the modern national Muslim states of today.

The most interesting part of the book to Western jurists and lawyers is that in which the author gives summaries and excerpts of legal codes which are the product of the development of Islamic law under the impact of Western law. Although these codes are not exactly the same in all the countries of the Near and Middle East, they have many elements in common, because they combine Western legal rules and principles with Islamic legal doctrines in order to meet the needs of Islamic countries that have developed under the impact of Western economic and political pressures.

In one volume, Dr. Liebesny has condensed much valuable material and he is to be congratulated for providing Western scholars with a work which is at once scholarly, clear, and useful.

MAJID KHADDURI

Der Rechtsstatus Deutschlands aus der Sicht der DDR. By Jens Hacker. (Koln: Wissenschaft und Politik, Berend von Nottbeck, 1974. Pp. 508. Index.) The central thesis of this major and well-organized study is that in

¹ 70 AJIL 887 (1976).

spite of Brandt's Ostpolitik and his agreements with the USSR, Poland, and the DDR (German Democratic Republic), things are very much as they were before. This of course may be politically true, and is a matter of opinion, but as Hacker's study is a typically juristic treatment of Brandt's initiatives in terms of international law, it can be tested from that point of view. As a matter of fact this is the only approach possible, as the material for the book comes from the legal writings of two Germanies, and ends with the decision of the West German Constitutional Court which was seized with the question of the constitutionality of the 1972 Grundvertrag (Basic Treaty) with the DDR.

Until 1949 juristic opinion in both Germanies agreed that Germany lost the capacity to handle its own international relations and that the Reich continued as a legal concept. Following the emergence of two German states, East Germany switched to the position that defeat destroyed the German Reich and that now Germany as a whole is a new political and legal entity. This raises a number of interesting points in terms of Marxist-Leninist teachings, and their discussion by Hacker constitutes one of the most interesting contributions to the science of Sovietology.

The book is organized in three parts. The first part covers DDR writings on the question of state succession. The second part discusses the evolution of Germany as a whole in the 1945-55 period. The third part analyzes the East-West German dialogue.

The legal problem is whether Germany is a legal concept today, unchanged by the Treaty of Moscow of August 12, 1970, the Treaty of Warsaw of December 7, 1970, and the Grundvertrag with the DDR of December 21, 1972. This question is answered by the opinion of the West German Constitutional Court of July 31, 1973, which declared that the Grundvertrag did not constitute recognition of the DDR as the second German State, which leads to the conclusion that the Reich before its defeat in World War II is still the only valid legal concept.

The reviewer must admit that he is somewhat puzzled by the reasoning of the Constitutional Court. A bilateral treaty—an international legal act—is certainly an act of recognition. The DDR, a member of the United Nations, is a member of the international community. To assert that the treaty with Poland is not a recognition of its frontiers is to fly in the face of fact. No concrete fact indicates that the German Reich in its frontiers of 1937 exists today. It has been succeeded by the new political configuration involving two Germanies, which may one day unite.

The book ends on a somewhat inconclusive note. Perhaps the question that the author so laboriously endeavored to answer should have been approached from a different perspective.

KAZIMIERZ GRZYBOWSKI

BOOKS RECEIVED *

Académie de Droit International. *Recueil des Cours*, 1975, Tome II (Vol. 145 of the collection). Leiden: A. W. Sijthoff, 1976. Pp. viii, 407.

American Enterprise Institute for Public Policy Research. *The Future of the United Nations*. A Round Table held on November 16, 1976, Washington, D.C. Washington: AEI, 1977. Pp. ii, 48. \$2.

Annals of Air and Space Law. Vol. I, 1976. Institute of Air and Space Law. Toronto: The Carswell Co., Ltd.; Paris: Editions A. Pedone, 1977. Pp. viii, 289.

* Mention here neither assures nor precludes later review.

- Atherton, Alexine L. *International Organizations. A Guide to Information Sources*. Detroit: Gale Research Co., 1976. Pp. xviii, 350. Indexes. \$18.
- Butler, William J., and Georges Levasseur. *Human Rights and the Legal System in Iran*. Geneva: International Commission of Jurists, 1976. Pp. viii, 72.
- Carnegie Endowment for International Peace. *The Proceedings of the Hague Peace Conferences. Translation of the Official Texts. The Conferences of 1899 and 1907. Index Volume* (reprint). Original prepared in the International Law Division of the Endowment under the supervision of James Brown Scott. New York: UNIFO Publishers, Ltd., 1975. Pp. xxiii, 272.
- Dias, R. W. M., and B. S. Markesinis. *The English Law of Torts. A Comparative Introduction*. Brussels: Etablissements Emile Bruylant, 1976. Pp. 287. Index. BF. 443.
- European Association for Legal and Fiscal Studies. *Branches and Subsidiaries in the European Common Market. Legal and tax aspects*. Second edition. Prepared by members of the Association. London: Kluwer-Harrap Handbooks; Deventer: Kluwer, 1976. Pp. 322.
- Graveson, R. H. *European Studies in Law. Vol. I: Comparative Conflict of Laws, Selected Essays. Vol. II: One Law On Jurisprudence and the Unification of Law, Selected Essays*. Amsterdam, New York, Oxford: North-Holland Publishing Co., 1977. Pp.: Vol. I, xviii, 379. Index. Vol. II, xvi, 287. Index. \$59.95, Dfl.150 for the two volumes.
- Iwanejko, Marian. *Spory Międzynarodowe. Studium Prawno-Polityczne*. Warsaw: Państwowe Wydawnictwo Naukowe, 1976. Pp. 276. ZL50.
- Kay, David A. *The International Regulation of Pharmaceutical Drugs. A Report to the National Science Foundation on the Application of International Regulatory Techniques to Scientific Technical Problems*. American Society of International Law, *Studies in Transnational Legal Policy* No. 14. St. Paul: West Publishing Co., 1976. Pp. 98. \$4.50.
- Kiss, Alexandre Charles. *Survey of Current Developments in International Environmental Law*. Morges, Switzerland: International Union for Conservation of Nature and Natural Resources, 1976. Pp. 140. Index.
- Kokot, Józef, and Krzysztof Skubiszewski. *Staatsangehörigkeit Sociale Grundrechte Wirtschaftliche Zusammenarbeit nach dem Recht der Bundesrepublik Deutschland und der Volksrepublik Polen. Referate des Rechtscolloquiums 1974*. Berlin, Heidelberg, New York: Springer-Verlag, 1976. Pp. 293. DM59, \$24.20.
- LaBarr, Dorothy F., and J. David Singer. *The Study of International Politics. A Guide to the Sources for the Student, Teacher, and Researcher*. Santa Barbara and Oxford: Clio Books, 1976. Pp. xix, 211. Index. \$17.95.
- Lebahn, Axel. *Sozialistische Wirtschaftsintegration und Ost-West-Handel im sowjetischen internationalen Recht*. Berlin: Duncker & Humblot, 1976. Pp. 495. Index. DM98.
- Leipziger, Danny M., and James L. Mudge. *Seabed Mineral Resources and the Economic Interests of Developing Countries*. Cambridge, Mass.: Ballinger Publishing Co., 1976. Pp. xxviii, 240. Index.
- Meissner, Friedrich. *Die Menschenrechtsbeschwerde vor den Vereinten Nationen*. Baden-Baden: Nomos Verlagsgesellschaft, 1976. Pp. 109.
- Melzer, Yehuda. *Concepts of Just War*. Leiden: A. W. Sijthoff, 1975. Pp. x, 190. Index. Dfl.39.00, \$15.50.
- Morse, Edward L. *Modernization and the Transformation of International Relations*. New York: The Free Press; London: Collier Macmillan Publishers, 1976. Pp. xix, 203. Index.
- Mosconi, Franco. *La Banca Europea per gli Investimenti (aspetti giuridici)*. Padua: CEDAM, 1976. Pp. xi, 331. L.8,000.
- Pease, Mina (ed.). *The Consolidated Index to the I.L.O. Legislative Series (1919-1970)*. New York: UNIFO Publishers, Ltd.; Oxford: Oxford Microform Publications, 1975. Pp. xvi, 264.

- Piradov, A. S. (ed.). *International Space Law*. Translated from the Russian by Boris Belitsky. Moscow: Progress Publishers; Chicago: Imported Publications, Inc., 1976. Pp. 271. Index. \$3.50.
- Popescu, Dumitra. *Forme si instrumente juridice de cooperare in Aviatia Civila Internationala*. Bucharest: Editura Academiei Republicii Socialiste România. Pp. 196.
- Reisman, W. Michael, and Burns E. Weston (eds.). *Toward World Order and Human Dignity. Essays in Honor of Myres S. McDougal*. New York: The Free Press; London: Collier Macmillan Publishers, 1976. Pp. xviii, 603. Index. \$20.
- Rosenau, James N. (ed.). *In Search of Global Patterns*. New York: The Free Press; London: Collier Macmillan Publishers, 1976. Pp. ix, 389. Indexes.
- Schachter, Oscar. *Sharing the World's Resources*. New York: Columbia University Press, 1977. Pp. xii, 172. Indexes. \$7.95.
- Schwarzenberger, Georg. *International Law as Applied by International Courts and Tribunals. Vol. III: International Constitutional Law: Fundamentals, The United Nations, Related Agencies*. London: Stevens & Sons Limited, 1976. Pp. lii, 680. Indexes. £26.
- Sumampouw, Mathilde. *Les Nouvelles Conventions de La Haye. Leur application par les juges nationaux*. Leiden: A. W. Sijthoff, 1976. Pp. xx, 458.
- Sundberg-Weitman, Brita. *Discrimination on Grounds of Nationality. Free Movement of Workers and Freedom of Establishment under the EEC Treaty*. Amsterdam, New York, Oxford: North-Holland Publishing Co., 1977. Pp. vii, 248. \$29.95, Dfl.75.
- Szász, Iván. *A Uniform Law on International Sales of Goods. The CMEA General Conditions*. Leiden: A. W. Sijthoff; Budapest: Akadémiai Kiadó, 1976. Pp. viii, 240. Dfl.55, \$21.
- U.S. Department of State. *Foreign Relations of the United States 1950. Vol. II: The United Nations; The Western Hemisphere*. Washington: U.S. Govt. Printing Office, 1976. Pp. xii, 1088. Index. \$13. (Dept. of State Pub. 8853)
- Historical Study. *Public Availability of Diplomatic Archives*. Compiled by Arthur G. Kogan. Copies available on request by writing to: Correspondence Division, Office of Media Services, Bureau of Public Affairs, Department of State; Washington, D.C. 20520.
- Váli, Ferenc A. *Politics of the Indian Ocean Region. The Balance of Power*. New York: The Free Press; London: Collier Macmillan Publishers, 1976. Pp. xv, 272. Index. \$14.95.
- Werdross, Alfred, and Bruno Simma. *Universelles Völkerrecht. Theorie und Praxis*. Berlin: Duncker & Humblot, 1976. Pp. 687. Index. DM58.
- von Pfeil, Helena P. *Oceans, Coasts and Law. Holdings of eighteen libraries with Union List, plus selected additional Books, Papers, Foreign and U.S. Articles categorized by Topic. Vols. I and II*. Dobbs Ferry: Oceana Publications, Inc., 1976. Pp. xvi, 887. \$55 per set.
- Zellentin, Gerda (avec la collaboration de John Goormaghtigh). *Les Missions Permanentes auprès des Organisations Internationales. Tome 4*. Brussels: Etablissements Emile Bruylant, 1976. Pp. 165. F.1,200.

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UNITED STATES—MEXICO

TREATY ON THE EXECUTION OF PENAL SENTENCES *

The United States of America and the United Mexican States, desiring to render mutual assistance in combating crime insofar as the effects of such crime extend beyond their borders and to provide better administration of justice by adopting methods furthering the offender's social rehabilitation, have resolved to conclude a Treaty on the execution of penal sentences and, to that end, have named their plenipotentiaries Joseph John Jova, Ambassador Extraordinary and Plenipotentiary by the President of the United States of America and Alfonso Garcia Robles, Secretary of Foreign Relations by the President of the United Mexican States,

Who, having exchanged their full powers and having found them in proper and due form, have agreed on the following Articles:

Article I

(1) Sentences imposed in the United Mexican States on nationals of the United States of America may be served in penal institutions or subject to the supervision of the authorities of the United States of America in accordance with the provisions of this Treaty.

(2) Sentences imposed in the United States of America on nationals of the United Mexican States may be served in penal institutions or subject to the supervision of the authorities of the United Mexican States in accordance with the provisions of this Treaty.

Article II

This Treaty shall apply only subject to the following conditions:

- (1) That the offense for which the offender was convicted and sentenced is one which would also be generally punishable as a crime in the Receiving State, provided, however, that this condition shall not be interpreted so as to require that the crimes described in the laws of the two States be identical in such matters not affecting the character of the crimes such as the quantity of property or money taken or possessed or the presence of interstate commerce.
- (2) That the offender must be a national of the Receiving State.
- (3) That the offender not be a domiciliary of the Transferring State.
- (4) That the offense not be a political offense within the meaning of the Treaty of Extradition of 1899 between the parties, nor an offense under the immigration or the purely military laws of a party.
- (5) That at least six months of the offender's sentence remains to be served at the time of petition; and

* Done at Mexico City, November 25, 1976. Not yet ratified. See *Contemporary Practice* section, *supra* p. 338.

- (6) That no proceeding by way of appeal or of collateral attack upon the offender's conviction or sentence be pending in the Transferring State and that the prescribed time for appeal of the offender's conviction or sentence has expired.

Article III

Each State shall designate an authority to perform the functions provided in this Treaty.

Article IV

(1) Every transfer under the Treaty shall be commenced by the Authority of the Transferring State. Nothing in this Treaty shall prevent an offender from submitting a request to the Transferring State for consideration of his transfer.

(2) If the Authority of the Transferring State finds the transfer of an offender appropriate, and if the offender gives his express consent for his transfer, said Authority shall transmit a request for transfer, through diplomatic channels, to the Authority of the Receiving State.

(3) If the Authority of the Receiving State approves the request, it shall promptly so inform the Transferring State and shall initiate the necessary procedures to effect the transfer of the offender. If it does not approve the request, it shall so notify promptly the Authority of the Transferring State.

(4) In deciding upon the transfer of an offender the Authority of each Party shall bear in mind all factors bearing upon the probability that the transfer will contribute to the social rehabilitation of the offender, including the nature and severity of his offense and his previous criminal record, if any, his medical condition, the strength of his connections by residence, presence in the territory, family relations and otherwise to the social life of the Transferring State and the Receiving State.

(5) If the offender was sentenced by the courts of a state of one of the Parties, the approval of the authorities of that state, as well as that of the Federal Authority, shall be required. The Federal Authority of the Receiving State shall, however, be responsible for the custody of the transferred offender.

(6) No offender shall be transferred unless either the sentence which he is serving has a specified duration, or such a duration has subsequently been fixed by the appropriate administrative authorities.

(7) The Transferring State shall furnish the Receiving State a statement showing the offense of which the offender was convicted, the duration of the sentence, the length of time already served by the prisoner and any credits to which the offender is entitled, such as, but not limited to, work done, good behavior or pretrial confinement. Such statement shall be translated into the language of the Receiving State and duly authenticated. The Transferring State shall also furnish the Receiving State a certified copy of the sentence handed down by the competent judicial authority and any modifications thereof. It shall also furnish additional information that might be useful to the Authority of the Receiving State in determining the treatment of the convict with a view to his social rehabilitation.

(8) If the Receiving State considers that the documents supplied by the Transferring State do not enable it to implement this Treaty, it may request additional information.

(9) Each Party shall take the necessary legislative measures and, where required, shall establish adequate procedures, to give for the purposes of this Treaty, legal effect, within its territory to sentences pronounced by courts of the other Party.

Article V

(1) Delivery of the offender by the authorities of the Transferring State to those of the Receiving State shall occur at a place agreed upon by both parties. The Transferring State shall afford an opportunity to the Receiving State, if it so desires, to verify, prior to the transfer, that the offender's consent to the transfer is given voluntarily and with full knowledge of the consequences thereof, through the officer designated by the laws of the Receiving State.

(2) Except as otherwise provided in this Treaty, the completion of a transferred offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise. The Transferring State shall, however, retain the power to pardon or grant amnesty to the offender and the Receiving State shall, upon being advised of such pardon or amnesty release the offender.

(3) No sentence of confinement shall be enforced by the Receiving State in such a way as to extend its duration beyond the date at which it would have terminated according to the sentence of the court of the Transferring State.

(4) The Receiving State shall not be entitled to any reimbursement for the expenses incurred by it in the completion of the offender's sentence.

(5) The Authorities of each party shall, every six months exchange reports indicating the status of confinement of all offenders transferred under this Treaty, including in particular the parole or release of any offender. Either Party may, at any time, request a special report on the status of the execution of an individual sentence.

(6) The fact that an offender has been transferred under the provisions of this Treaty shall not prejudice his civil rights in the Receiving State in any way beyond those ways in which the fact of his conviction in the Transferring State by itself effects such prejudice under the laws of the Receiving state or any State thereof.

Article VI

The Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts. The Receiving State shall, upon being advised by the Transferring State of action affecting the sentence, take the appropriate action in accordance with such advice.

Article VII

An offender delivered for execution of a sentence under this Treaty may not be detained, tried or sentenced in the Receiving State for the same offense upon which the sentence to be executed is based. For purposes of this Article, the Receiving State will not prosecute for any offense the prosecution of which would have been barred under the law of that State, if the sentence had been imposed by one of its courts, federal or state.

Article VIII

(1) This Treaty may also be applicable to persons subject to supervision or other measures under the laws of one of the Parties relating to youthful offenders. The Parties shall, in accordance with their laws, agree to the type of treatment to be accorded such individuals upon transfer. Consent for the transfer shall be obtained from the legally authorized person.

(2) By special agreement between the Parties, persons accused of an offense but determined to be of unsound mental condition may be transferred for care in institutions in the country of nationality.

(3) Nothing in this Treaty shall be interpreted to limit the ability which the Parties may have, independent of the present Treaty, to grant or accept the transfer of youthful or other offenders.

Article IX

For the purposes of this Treaty,—

(1) "Transferring State" means the party from which the offender is to be transferred.

(2) "Receiving State" means the party to which the offender is to be transferred; and

(3) "Offender" means a person who, in the territory of one of the parties, has been convicted of a crime and sentenced either to imprisonment or to a term of probation, parole, suspended sentence, or any other form of supervision or conditional sentence without confinement.

(4) A "domiciliary" means a person who has been present in the territory of one of the parties for at least five years with an intent to remain permanently therein.

Article X

(1) This Treaty is subject to ratification. The exchange of ratifications shall take place in Washington.

(2) This Treaty shall enter into force thirty days after the exchange of ratifications and shall remain in force for three years.

(3) Should neither contracting party have notified the other ninety days before the three-year period mentioned in the preceding paragraph has expired of its intention to let the Treaty terminate, the Treaty shall remain in force for another three years, and so on every three years.

DONE at Mexico City in duplicate, this twenty-fifth day of November, one thousand nine hundred seventy six, in the English and Spanish languages, each text of which shall be equally authentic.

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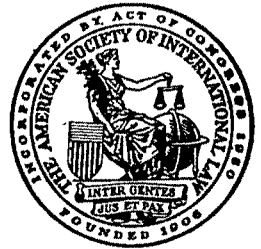
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THREE PERSPECTIVES ON SOVEREIGN IMMUNITY

PUBLIC DEBT AND SOVEREIGN IMMUNITY: THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

By Georges R. Delaume *

The Foreign Sovereign Immunities Act of 1976 (the Act)¹ took effect on January 19, 1977, some six months after the entry into force of the European Convention on State Immunity (the Convention).² Both instruments are of direct interest to the financial community since they dispel vestigial fictions concerning the public debt of foreign sovereigns and extend to the borrowings of foreign sovereigns the restrictive doctrine of immunity generally applicable to contracts concluded by foreign states.

The result of years of labor and the successful outcome of two bills, respectively introduced in Congress in 1973³ and 1975,⁴ the Act significantly improves the situation of private claimants. It (i) affords them new means of effecting process against foreign states, their political subdivisions, and agencies;⁵ (ii) ensures that the judicial process of determination will no longer be hampered by suggestions of immunity by the Department of State; and (iii) enables private persons, if judgment is rendered in their favor, to proceed with execution against the property of the defendant.⁶ Favorable to private claimants, the Act also offers some positive and very practical advantages to foreign sovereigns. It puts an end to the earlier practice of prejudgment attachment which, for lack of *in personam* jurisdiction against foreign sovereigns, was the ultimate recourse open to private litigants and enabled them to maintain a *quasi in rem* action against a foreign governmental entity.⁷ This practice, which was a continuing irri-

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¹ Public Law 94-583, 28 USC §1, 90 Stat. 2891, 15 ILM 1388 (1976). See also *Official Documents* section, *infra* pp. 595-601.

² On June 11, 1976, upon ratification by Austria, Belgium, and Cyprus. The Convention has also been signed by the Federal Republic of Germany, Luxembourg, The Netherlands, Switzerland, and the United Kingdom.

The text of the Convention is reproduced in 11 ILM 470 (1972) and in G. DELAUME, *TRANSNATIONAL CONTRACTS*, Appendix I, Part iv (1975, updated 1976).

³ Known as S.566, H.R. 3493, 93d. Cong., 1st Sess. (1973); 12 ILM 118 (1973).

⁴ Known as H.R. 11315, S/8877, 94th Cong., 1st Sess. (1976); 15 ILM 90 (1976); 70 AJIL 313 (1976).

⁵ See *infra* notes 37 to 44 and accompanying text.

⁶ See *infra* notes 51 to 64 and accompanying text.

⁷ See e.g., Lowenfeld, *Litigating a Sovereign Immunity Claim—Haiti Case*, 49 N.Y.U.L. REV. 377 (1974).

tant upon the foreign relations of the United States because of the protests that it did not fail to provoke on the part of foreign sovereigns, had also proved ineffective, since the property attached could not be executed upon.⁸ By allowing *in personam* actions to be brought against foreign sovereigns, the Act also gives such sovereigns the assurance that there will be no interference without cause with their property in the United States.

In general terms, the Act reaffirms the restrictive doctrine of immunity, which was first formulated in the "Tate Letter,"⁹ and vests in the courts exclusive jurisdiction over matters of sovereign immunity. In addition, the Act further provides a federal long-arm statute allowing the assertion of *in personam* jurisdiction over states when the necessary contacts with the forum are present. In this last respect, however, the Act may constitute a new incentive to litigation, since it leaves open to judicial discretion many of the factors on which jurisdiction may be entertained or declined.

The European Convention on State Immunity differs in approach from the Foreign Sovereign Immunities Act. Although the Convention, like the Act, endorses the restrictive doctrine of immunity, the Convention is a real attempt at codifying the rules applicable to the immunity of foreign sovereigns and leaves practically no discretion to the judiciary. The Convention, which came into force upon ratification by Austria, Belgium, and Cyprus on June 11, 1976, and is in effect among those states, has been signed by a number of the European Governments, including those in which some of the world's leading financial markets are located, whose ratification is probably only a matter of time.¹⁰ However, the Convention, even though it starts from premises in appearance strikingly different from those of the Foreign Sovereign Immunities Act, has, because of a number of built-in qualifications, many features in common with the Act and the results reached under one or the other instrument should not, in many cases, be very far apart. This is a consideration which is of importance since it might facilitate accession by the United States to the Convention in its present form or call for a global effort to reassess the fundamental issues involved and give the world certain standards of sovereign conduct beneficial to both states and private contracting parties.

An interesting feature of both the Act and the Convention concerns waivers of immunity. Both instruments provide that waivers of immunity are binding and irrevocable. In view of the well-established practice of lenders to stipulate waivers of immunity in loan contracts with foreign sovereign borrowers, formal recognition of the irrevocable character of such stipulations is an encouraging development. It puts an end to legal uncertainties which, even though they did not deter lenders from stipulating waivers of immunity in loan documents, sometimes clouded the effective-

⁸ *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F. 2d 705 (2d Cir. 1930), cert. denied 282 U.S. 896 (1931). *Weilamann v. Chase Manhattan Bank*, 192 N.Y.S. 2d 649, 21 Misc. 2d 1086 (Sup. Ct. 1959), in which an action in aid of attachment failed, following a suggestion of immunity by the Department of State.

⁹ May 19, 1952, 26 DEPT. STATE BULL. 984 (1952).

¹⁰ See note 2 *supra*.

ness of the lenders' remedies in the event that the borrower would renege on its undertakings.¹¹

In addition to analyzing the immunity rules set forth in the Act and comparing them when appropriate with those of the Convention, the following discussion will, therefore, also give due attention to waivers of immunity and the type of issues encountered by lenders and their legal advisers in drafting such stipulations. In this connection, it should be noted that waivers of immunity, although their primary object is to cope with substantive rules of immunity, also involve procedural and jurisdictional issues similar to those arising in the context of choice of forum clauses in transnational contracts between private parties. In order to take these issues into account, the draftsman must therefore, in addition to becoming an expert in the law of sovereign immunity, also give full attention to such matters as service of process, the enforceability of choice of forum clauses, and, last but not the least, the recognition and enforcement of foreign credit judgments or awards.¹²

Today international borrowers include not only foreign sovereigns but also an increasing number of international or regional organizations, and particularly those engaged in international lending and economic development activities, such as the World Bank, the African, Asian, European, and Inter-American Development Banks, and the European Communities, to mention but a few. These organizations, in contrast to the United Nations and most Specialized Agencies, do not enjoy general immunity from suit and execution. Such an immunity might have proved detrimental to the success of their borrowings and render securities issued by them less attractive to the financial community. For this reason, the charters of these organizations permit suit to be brought against them by their respective creditors. The same basic considerations also explain the limited immunity from execution of these organizations. To allow creditors to bring action against an organization without giving them the means to enforce a judgment in their favor against the organization's property would be self-contradictory. Hence, the provision commonly found in the charters of these organizations that their immunity from execution ceases to exist after recovery of final judgment against them.¹³ So long as litigation arising out of loans raised by such organizations in member countries is concerned, the draftsman may therefore rely on the provisions of the charter of the borrowing organization and can dispense with waivers of immunity whose *raison d'être* would be nonexistent.

The situation may be different when loans are raised by such an organization in a nonmember country. Such has been the case in regard to bond issues by the European Coal and Steel Community and the European Investment Bank in the United States. These bonds contain express

¹¹ 6 DELAUME, *LEGAL ASPECTS OF INTERNATIONAL LENDING AND ECONOMIC DEVELOPMENT FINANCING* 169-77 (1967) [hereinafter cited as DELAUME, *LEGAL ASPECTS*].

¹² DELAUME, *supra* note 2, Chs. VI-X and XIII.

¹³ *Id.* §§11.03 and 12.04.

waivers of immunity.¹⁴ Similar problems could arise if other European Communities were to raise funds in American markets or in the markets of nonmember countries, such as Switzerland. Situations such as these must be dealt with on an *ad hoc* basis, after careful consideration of all the factors involved. A review of these factors would exceed the limits of the present discussion and no more will be said as to the immunity features of loans raised by international or regional organizations.¹⁵

I.

THE IMMUNITY RULES OF THE ACT IN THE ABSENCE OF WAIVERS OF IMMUNITY

A. IMMUNITY FROM JURISDICTION

(1) *Persons Entitled to Immunity*

According to §1603(a) and (b), the immunity rule, which under the Act remains the general principle, subject, however, to several limitations,¹⁶

¹⁴ See DELAUME, *LEGAL ASPECTS*, *supra* note 11, at 176-77 and for more recent examples:

(a) European Coal and Steel Community \$75 million 8-1/8% Notes, due November 15, 1984 and 8-7/8% Bonds, due November 15, 1996 (prospectus dated Nov. 10, 1976, at 17):

The ECSC will appoint the Fiscal Agent as its authorized agent in New York City upon which process may be served in actions arising out of or based upon the Notes or the Bonds which may be instituted in any State or Federal court in The City and State of New York by the holder thereof and the ECSC will irrevocably waive any immunity from jurisdiction to which it might otherwise be entitled in any such action. However, with respect to execution, the Merger Treaty provides that the property and assets of the ECSC may be taken or constrained by legal process only upon authorization of the Court of Justice of the European Communities. The Notes, the Bonds and the Fiscal Agency Agreements will each provide that it will be governed by and interpreted in accordance with New York law, except with respect to its authorization and execution on behalf of the ECSC and any other matters required to be governed by the laws of the ECSC, and that the jurisdiction of the Court of Justice of the European Communities will extend to any dispute between a holder of Notes or Bonds and the ECSC.

(b) European Investment Bank 8-7/8% Bonds, due December 15, 1996 (prospectus dated Dec. 14, 1976, at 14-15):

The Bonds will be governed by, and construed in accordance with, the laws of the State of New York except as to matters relating to the authorization and execution of the Bonds by the EIB, which shall be governed by the Treaty of Rome and the Statute. The EIB will appoint the Fiscal Agent as its authorized agent in New York City upon which process may be served in any action based on the Bonds which may be instituted in any State or Federal court in New York City by the holder of a Bond and will expressly accept the jurisdiction of such courts in respect of such action. Notwithstanding the foregoing, any action based on the Bonds may be instituted by the holder of a Bond in any competent court of the jurisdiction in which the EIB has its seat. The EIB will irrevocably waive any immunity from jurisdiction or execution to which it or its property might otherwise be entitled in any action based on the Bonds which may be instituted by the holder of a Bond in any State or Federal court in New York City. However, the property and assets of the EIB within the Member States are not subject to attachment or to seizure by way of execution without the authorization of the Court of Justice.

¹⁵ The Act provides in §1611(a) for immunity from attachment of funds held by organizations designated by the President of the United States pursuant to the Inter-

applies to (i) the central government of a foreign state; (ii) its political subdivisions,¹⁷ and its agencies and instrumentalities which are defined as any entity:

- (1) which is a separate legal person, corporate or otherwise, and
- (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
- (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.¹⁸

This definition provides for a cumulative test, which appears reasonable. The requirement that the entity in question be a separate legal person is consistent with the views generally prevailing in other countries,¹⁹ and the condition that the entity should not be a creation of the law of any third country, is understandable since, as pointed out in the Section-by-Section Analysis, an independent entity, established or owned by a foreign state in another country, such as the United States, would presumably be engaged in activities of a commercial or private law nature and thus not entitled to immunity.²⁰ The last element of the definition, concerning

national Organizations Immunities Act, pending disbursements of such funds to, or on the order of, a foreign state. This provision is discussed in Delaume, *Public Debt and Sovereign Immunity Revisited: Some Considerations Pertinent to H.R. 11315*, 70 AJIL 538-40 (1976).

¹⁶ §§1604 and 1609. This is the converse approach of that taken by the drafters of the European Convention. The Convention assumes that there are situations, which can be identified and are listed in the Convention, in which a Contracting State would have no immunity from suit. It is only in cases other than those enumerated in the Convention that a Contracting State would be entitled to plead immunity as a defense. In other words, under the Convention, sovereign immunity, rather than being the principle, becomes a purely residual concept.

¹⁷ The Section-by-Section Analysis annexed to H.R. 11315, the bill from which the Act finally emerged (15 ILM 90 (1976)) stated that: "The term 'political subdivisions' includes all governmental units beneath the central government including local governments." (Comment on §1603(a), *id.* 104).

This definition, which in respect of the constituent states of a federal state is consistent with U.S. case law, is not necessarily supported by cases dealing with foreign municipalities. See DELAUME, *supra* note 2, §11.02 text and notes 6-7. It is in sharp contrast with the European Convention, since under the Convention political subdivisions do not, as a rule, enjoy immunity (Arts. 27 and 28(1)), subject, however, to the right of a Contracting State (Art. 28(2)) to declare, by notification to the Secretary General of the Council of Europe, that its constituent states may invoke the provisions of the Convention applicable to Contracting States and have the same obligations.

¹⁸ §1603(b). This provision contrasts also with the European Convention which denies immunity to "any legal entity of a Contracting State which is distinct therefrom and is capable of suing and being sued, even if that entity has been entrusted with public functions." (Art. 27(1), subject, however, to the exception in paragraph 2 of the same provision in respect of acts *jure imperii*).

¹⁹ DELAUME, *supra* note 2, §11.02 text and notes 13-17.

²⁰ See *Amtorg Trading Co. v. United States*, 71 F. 2d 554 (C.C.P.A. 1934).

ownership, is based on a possibly crude but simple test, which affords a practical solution to a perennial problem. It has the advantage of avoiding the complexities of such notions as "control" of the affairs of a corporation or such techniques as "piercing the corporate veil," which, in the transnational field, have sometimes been used by American courts to expand the scope of their jurisdiction to the widest possible limits.²¹

(2) *Nature of the Act*

The general exceptions to the rule of immunity are found in §1605. The exceptions which are germane to the present discussion include waivers of immunity, which will be considered in the second part of this article, and the "commercial activity" of a foreign state,²² which now deserves attention.

According to §1603(d) and (e):

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

This "definition" leaves much to be desired. While the mandate given to the courts to determine the commercial character of a state's activity in function of the "nature" rather than the "purpose" of such activity is in accord with American²³ and non-American²⁴ decisions, and the provisions of the European Convention,²⁵ the absence of further indication as to the factors relevant for the necessary determination leaves the content of the definition highly uncertain. Unlike the European Convention, which contains a list of acts deemed in all cases to be of a commercial nature,²⁶ the Act surrenders to the judiciary the task of making the final pronouncement. This is hardly consistent with the much advocated "codifying" purpose of the Act. It is true that the broad jurisdiction given to the federal courts in matters of sovereign immunity may be "conducive to uniformity in decision."²⁷ Yet, there is no assurance that similar transactions may not be treated in different ways. The sovereign immunity bills²⁸ contained a

²¹ DELAUME, *supra* note 2, §7.03 text and notes 17-31.

²² §1605(a)(2).

²³ *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354 (2d Cir. 1964), *cert. denied* 381 U.S. 934 (1965).

²⁴ DELAUME, *supra* note 2, §11.05.

²⁵ *Id.*

²⁶ Arts. 4-14.

²⁷ Section-by-Section Analysis, comment on Section 2 of the bill and proposed §1330 of Title 28 U.S.C. (*Supra* note 17, at 102). Plaintiffs may still elect to proceed in a state court. However, any such action may be removed by the foreign state to the proper district court. See Section 6 of the Act.

²⁸ See notes 3 and 4 *supra*.

§1606 dealing with the "public debt" of foreign states, which afforded a dramatic example of a total lack of uniformity in the treatment of a single type of operation, namely the public debt of foreign sovereigns.

The proposed section would have made a fundamental distinction between the "public debt" of foreign states, meaning the central government of a foreign state, and that of the political subdivisions, agencies, or instrumentalities. Political subdivisions, agencies, or instrumentalities would have enjoyed no immunity at all in regard to their own borrowings in the United States. Borrowings made by such entities would have been regarded as akin to commercial acts and been governed by the provisions of the bill applicable to such transactions. On the contrary, §1606(b) adhered, in respect of the public debt of a central government, to the rule of total immunity, subject only to cases in which the government would have "explicitly" waived its immunity and cases arising under the federal securities laws of the United States. No reason was given for this distinction, which in effect was based simply on the "personality" of the borrower rather than the "nature" of the act since the foreign borrowings of public entities, whatever their type, raise substantially the same financial and juridical issues.

This provision, which had been criticized,²⁹ has been deleted and the Act makes no mention of the public debt of foreign states. The deletion can have no meaning other than to restore the unity of treatment of the borrowing activities in the United States of foreign public borrowers, regardless of whether the borrower is a state or a political subdivision or an agency of a foreign sovereign. Since under the sovereign immunity bills, borrowings made by political subdivisions and agencies were regarded as commercial acts and exception to this general rule was made only in respect of the public debt of central governments, it follows that, with the removal of the exception, the public debt of such governments should also be treated as a transaction of a commercial nature.

If this interpretation is correct, the Act would be in accord with the provisions of the Convention. Pursuant to Article 4 of the Convention, all contracts, including loans and other financial transactions, between a Contracting State and private persons which are to be performed in another Contracting State are subject to the nonimmunity rule set forth in the Convention.

Since the Act, however, does not contain the type of explicit statutory definition found in the Convention, there is no assurance that all courts would subscribe to the present line of reasoning and that judicial pronouncements on the subject will always be consistent.

Under the circumstances, it may become a matter of elementary prudence to provide in the loan documents, as lenders did before the Act, a contractual definition of the transaction, possibly couched in the following

²⁹ Delaume, *Public Debt and Sovereign Immunity: Some Considerations Pertinent to S. 566*, 67 AJIL 745 (1973), and *Public Debt and Sovereign Immunity Revisited*, *supra* note 15, at 529.

terms:

The borrowings hereunder shall be private and commercial acts and shall not be regarded as governmental or public acts.

or words to the same effect. Such a contractual characterization of the transaction might go a long way in winning the court's favor. By going to the root of the matter, such a stipulation would make it difficult, or at least particularly awkward, for (i) the borrower to reopen at the time of the proceedings a basic issue of definition to which he agreed in the first place and (ii) the court to substitute its own characterization for that adopted by the parties, without exposing itself to the reproach of rewriting the contract for them.

(3) *Jurisdictional and Procedural Issues*

(a) *A long-arm federal statute*: Pursuant to §1605(a)(2), a foreign state, including its political subdivisions, agencies, and instrumentalities, is not immune from the jurisdiction in any case:

... in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

This provision echoes American long-arm statutes founding jurisdiction on such concepts as "doing" or "transacting" business within the state. The difference between the Act and such statutes is simply that under the Act the court must determine whether the defendant state is engaged in a commercial activity before considering whether such an activity is sufficiently connected with the United States to authorize the court to assume jurisdiction.

Subject to this remark, the Act provides for three situations in which a court can entertain claims based upon the commercial activity of a foreign state. The first situation assumes that such an activity is "carried on in the United States" and includes not only a commercial course of conduct on a regular basis, but also a single act "performed in whole or in part in the United States."³⁰ In the absence of further indication as to what may constitute "doing" or "transacting" business, it is to be feared that the Act may give rise to the same conflicting interpretations that beset the implementation of state long-arm statutes.

Whether this fear will prove justified in regard to the commercial activities in the United States of foreign states is not known at the present time. In the particular sector of financial transactions, it would seem that the fear is unwarranted since, as a practical matter, the nexus between the United States and a particular loan transaction concluded by a foreign state with American financial institutions should nearly always be sufficient to justify the assumption of jurisdiction.

³⁰ Section-by-Section Analysis, Comment on §1603(e), *supra* note 17, at 105.

In an attempt to clarify the issue, the Section-by-Section Analysis annexed to the last sovereign immunity bill included among other examples of transactions having a substantial contact with the United States:

... an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States (e.g., loans, guarantees or insurance provided by the Export-Import Bank of the United States).³¹

This explanation is consistent with the solutions which obtain under state statutes, such as the New York Civil Practice Law and Rules.³² It is also in accord with current negotiating practice. Loans made in the United States to foreign states may take the form of contracts directly negotiated by banks or other financial institutions or of securities issued in the private capital market. In both cases, either as a result of the contacts established during loan negotiations or of the need to comply with the securities laws of the United States, there is ample evidence of the nexus required by the Act to found jurisdiction.

This last consideration disposes of an issue which might arise in connection with nonfinancial transactions of foreign sovereigns, namely possible recourse to the doctrine of *forum non conveniens*. Presumably, the courts could rely on that doctrine when, even though jurisdiction would exist under the Act, an American forum would be seriously inconvenient and exercising jurisdiction would not be in the interest of the parties or the public. In the financial field, it would seem that there is little or no reason for the application of the doctrine. The extent of the negotiations taking place in the United States and/or compliance with registration requirements under the securities laws should normally lead to the conclusion that an American court would be an appropriate forum. Also, the magnitude of the sums involved, together with the fact that foreign sovereign borrowers usually maintain some form of "presence" in the United States, such as a consular officer or other official representative or a fiscal or paying agent upon whom process may be served, would indicate that pleading in an American forum would impose no undue hardship upon the borrower and that jurisdiction should be retained.

For all these reasons, the "carrying on" provision in §1605(a)(2) appears, in the financial field, if not necessarily always in other fields, unobjectionable and corresponding to reality. The two additional bases of jurisdiction provided for in §1605(a)(2), however, are somewhat disturbing. The first of these concerns the performance in the United States of an "act" in connection with a "commercial activity of the foreign state elsewhere." The Section-by-Section Analysis makes it clear that such commercial activity may be "a regular course of commercial conduct elsewhere" or "a particular commercial transaction concluded or carried out in part

³¹ *Id.* at 106.

³² NYCPLR §302(a)(1). See e.g., *Lewis and Eugina Van Wezel Foundation, Inc. v. Guerdon Industries, Inc.*, 450 F. 2d 1264 (2d Cir. 1971); *Irving Trust Co. v. Smith*, 349 F. Supp. 146 (S.D.N.Y. 1972).

elsewhere,"³³ thus reintroducing the concept of "doing" or "transacting" business into a situation the center of gravity of which is outside the United States, but which, through the performance of an "act" in the United States would fall within the jurisdictional orbit of the U.S. courts. The Section-by-Section Analysis mentions as an example "an act in the United States that violates U.S. securities laws or regulations."

The last jurisdictional basis relates to acts committed abroad in connection with a commercial activity abroad but causing "a direct effect" in the United States. The Section-by-Section Analysis describes such situation as embracing:

... commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in Section 18, *Restatement of the Law, Second, Foreign Relations Law of the United States* (1965).³⁴

This is not the place to discuss the merits of the extraterritorial effects of the U.S. securities and antitrust laws.³⁵ All that needs to be said is that §1605(a)(2) gives to the securities laws a new dimension, since the "act" founding jurisdiction, whether it is committed within or outside the United States, is *ex hypothesi* that of a foreign sovereign or public entity and not, as in the usual case, that of a private individual or corporation. Since it is most unlikely that foreign sovereign borrowers would engage in activities violating the U.S. securities laws, the issues raised by §1605(a)(2) are more theoretical than practical. Yet, the reaction of foreign states to this type of legislation may be interesting to watch.

(b) *Service of process*: The Act provides that service may be made in accordance with specific arrangements, if any, agreed upon by the parties.³⁶ Failing such arrangements, service may be made in different ways, depending upon whether action is brought against (i) a foreign state or a political subdivision thereof, or (ii) an agency or instrumentality. Service on foreign states and political subdivisions may be made (i) in accordance with an applicable international convention,³⁷ such as the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents;³⁸ or (ii) in the absence of such a convention or any arrangement between the parties, by mail;³⁹ or (iii) if service cannot be made by mail within 30 days, and as a last resort, through diplomatic channels.⁴⁰ Service on an agency or

³³ *Supra* note 17, at 107.

³⁴ *Id.*

³⁵ See e.g., among recent literature, Mizrack, *Recent Developments in the Extraterritorial Application of Section 10(b) of the Securities and Exchange Act of 1934*, 30 THE BUSINESS LAWYER 367 (1975); Sandberg, *The Extraterritorial Reach of American Economic Regulation: The Case of Securities Law*, 17 HARV. INT'L. L. J. 315 (1976); Rosenfield, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STANFORD L. REV. 1005 (1976); Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553 (1976).

³⁶ §1608(a)(1) and (b)(1).

³⁷ §1608(a)(2).

³⁸ 20 UST 361, TIAS No. 6638, 658 UNTS 163, 60 AJIL 464 (1966).

³⁹ §1608(a)(3).

⁴⁰ §1608(a)(4). See also 22 CFR §§93.1 and 93.2.

instrumentality may be made, if there is no special agreement between the parties, (i) by service upon officers, managing, general, or appointed agents in the United States of the agency or instrumentality, or in accordance with an applicable international convention on service of judicial documents⁴¹ or (ii) by letter rogatory or request by mail or as directed by the court provided that the mode of service is "consistent with the law of the place where service is to be made."⁴²

This array of procedural alternatives should prove adequate to achieve effective service of process. The Act also establishes the time when service shall be deemed to have been made under each of these alternatives⁴³ and gives the foreign state, political subdivision, agency, or instrumentality up to 60 days from the time service is deemed to have been made in which to answer or file a responsive pleading.⁴⁴

These are rules of a general character. In the financial field, they are of relative importance, since loan documents prepared by American draftsmen will hardly ever fail to contain "service of process" or "notice" provisions meeting the "special arrangements" test of the Act.⁴⁵

(c) *Jurisdiction and venue*: The Act provides that the district courts have original jurisdiction of all actions, regardless of the amount in controversy, against foreign states, their political subdivisions, and instrumentalities.⁴⁶

As to venue, the Act provides that action may be brought (i) in the judicial district where a substantial part of the events (or omissions) giving rise to the claim occurred, or a substantial part of the property that is subject to the action is situated;⁴⁷ (ii) in the district in which the agency or instrumentality is licensed to do business or is doing business;⁴⁸ or (iii) in the U.S. District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.⁴⁹

In the financial field, these provisions are, once more, of little practical significance in view of the usual stipulations in loan documents, whether directly connected with the American capital market or relating to Euro-market operations, which provide for the applicability to American (state) law and submission of loan disputes to the jurisdiction of American (state and federal) courts of loan disputes.⁵⁰

B. IMMUNITY FROM EXECUTION

(1) *General Rules*

The Act makes deep inroads into earlier American rules regarding immunity from attachment of, and execution against, the property of foreign

⁴¹ §1608(b)(2).

⁴² §1608(b)(3)(A), (B), and (C).

⁴³ §1608(c).

⁴⁴ §1608(d). This rule corresponds to similar provisions applicable to suits against the United States and its agencies. Rule 12(a) F. R. Civ. Pr.

⁴⁵ See e.g., the provisions quoted in note 14 *supra* and note 84 *infra*.

⁴⁶ Section 2, amending Ch. 85 of Title 28 U.S.C. §1330(a).

⁴⁷ Section 5, amending §1391 of Title 28 U.S.C., para (f)(1).

⁴⁸ *Id.* para. (f)(3).

⁴⁹ *Id.* para. (f)(4).

⁵⁰ See e.g., the provisions quoted in note 14 *supra* and note 84 *infra*.

governmental entities. For all practical purposes, §1610(c) and (d) eliminates the earlier practice of prejudgment attachment for the purposes of acquiring jurisdiction and maintaining a *quasi in rem* action. Pursuant to §1610(c) and (d), no prejudgment attachment can be made before rendition of judgment or, in the case of default judgment, before a certain period of time after notice of the default is given to the defendant,⁵¹ without court permission, unless the foreign sovereign has explicitly waived its immunity prior to judgment and the purpose of the attachment is solely to prevent the removal of property that may ultimately be the object of execution following entry of judgment against the foreign governmental defendant.

As to postjudgment measures of execution, §§1609 and 1610 match the rules set forth in §§1604 and 1605 in regard to immunity from suit. §1609 maintains, "subject to existing international agreements"⁵² of the United States, the rule of immunity, while §1610 makes a number of exceptions to the rule.

Pursuant to §1610(a), the property in the United States of a foreign state used for a commercial activity in the United States is not immune from attachment or execution if, *inter alia*, (i) the foreign state has waived its immunity, explicitly or by implication or (ii) the property "is or was used" for the commercial activity upon which the claim is based.

These exceptions apply to (i) a foreign state, (ii) its political subdivisions, and (iii) its agencies and instrumentalities. In addition, §1610(b) provides, but only in respect of agencies or instrumentalities, that the property of any such entity engaged in a commercial activity in the United States is not immune from execution if (i) the entity has waived, explicitly or implicitly, its immunity or (ii) the judgment relates to a claim for which the entity is not otherwise immune from suit. If all these conditions are satisfied, the entity is subject to execution against *all* its property in the United States, regardless of whether there is a link between the property in question and the commercial activity from which the claim arose.

The result of these distinctions is somewhat puzzling. The nonimmunity rule applies in its entirety only to the property of agencies and instru-

⁵¹ The Section-by-Section Analysis (*supra* note 17, at 115) indicated that:

In determining whether the period has been reasonable, the courts should take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months. Courts should also take into account representation by the foreign state of steps being taken to satisfy the judgment.

Reasonable as it seems to avoid diplomatic embarrassment to the executive branch of the government, this suggestion may put the rights of private claimants in abeyance for protracted periods of time.

⁵² The Act now refers only to "existing" international agreements of the United States. The preceding bill referred as well to "future" international agreements. The deletion of the word "future" in the final version of the Act is no cause for concern. It is well settled that the provisions of an international agreement of the United States have precedence over existing domestic statutes. Thus, if the United States were to accede to the European Convention, the Convention would supersede the provisions of the Act.

mentalities. Only a "limited" nonimmunity rule applies to the property of a foreign sovereign or its political subdivisions, since in so far as these are concerned, immunity prevails unless it is established that there is a link between the property involved and the commercial activity out of which the dispute arises. It is, in effect, based upon the "personality" of the foreign party and not on the "nature of the act," which should be the determining factor if the basic philosophy of the Act is to be respected. If traditional notions of sovereign immunity might explain that the assets of a foreign sovereign be treated differently from those of other public entities, there is surely no reason to carry the distinction further and to differentiate between the property of political subdivisions and that of agencies or instrumentalities. The European Convention denies immunity to all entities, including political subdivisions, other than the foreign sovereign.⁵³ Accession to the Convention by the United States would thus mean that in the relations between the United States and other signatories, §1610(a)(2) would cease to be relevant and political subdivisions would be exposed to the same treatment as agencies or instrumentalities. As to sovereign states, however, the Convention is more restrictive than §1610(a), since the Convention maintains, in the absence of an express waiver in writing, the immunity rule.⁵⁴

The provisions of the Act on immunity leave certain questions unanswered. One of these is a matter of great practical significance. It is well known that it is not always easy to identify the particular commercial or *jure imperii* use for which the assets of a foreign public entity are intended and that it may be difficult to prevent such an entity, particularly if its property consists of banking accounts, from switching its assets around in such a way as to confuse the situation and, in effect, to remove its property from the reach of its creditors. In order to anticipate such manipulations, §1610(a)(2) subjects to execution property which "is or was used" by the relevant entity in connection with its commercial activity. The intent of this provision is clear. Its implementation, however, may not be free from difficulty since the proposed section does not specify who will bear the burden of proof, *i.e.*, the entity or the plaintiff. This issue is of crucial importance to private claimants and is well illustrated by a French and a Swiss case. According to the French Cour de

⁵³ Art. 27(2) and 28(2), subject, however, to the possible notification by a federal state party to the Convention that its "constituent states" may invoke the provisions of the Convention. Art. 28(2).

⁵⁴ Art. 23. Note, however, that under Article 20, a Contracting State, which is not entitled to immunity from suit, is, after final judgment rendered against it by a court in another Contracting State, under an obligation to "give effect" to that judgment. So long, therefore, as a Contracting State would comply with that obligation, the issue of immunity from execution would not arise. This is a consideration which, from the practical viewpoint, is not without significance, since a sovereign may, once the battle of immunity from suit has been lost, not be unwilling to settle the claim. See *e.g.*, *National City Bank of New York v. Republic of China*, 348 U.S. 356, 75 S. Ct. 423 (1955); Delaume, *supra* note 2, para. 11.08 text and notes 4-5.

Cassation,⁵⁵ the creditor would have to prove the commercial use of the property in question. On the contrary, a judgment of the Swiss Tribunal Fédéral⁵⁶ would place the burden of proof on the foreign public entity. The difference in approach is striking.⁵⁷ The Act, however, leaves in doubt the solution which might prevail in the United States.

(2) *Exceptions*

Having affirmed the principle of immunity subject to exceptions, some of which have been discussed above, the Act proceeds with making exceptions to the exceptions and exempts from execution certain types of property. Only one of these exceptions—that relating to the property of foreign central banks⁵⁸—is directly relevant to the present discussion.

There is no uniform agreement as to the immunity of central banks, which as financial institutions may perform acts of a commercial nature, or may as regulatory agencies, *e.g.*, in connection with matters concerning the national currency or exchange controls, act on behalf of their own government and accomplish acts of a public law character. Two recent decisions, among others,⁵⁹ nicely illustrate the nature of the problem. Both cases, one English⁶⁰ and the other American,⁶¹ involved actions brought against Nigeria and the central bank of that country by allegedly unpaid sellers of cement supplied to Nigeria and Nigerian agencies. Both claimants sought to attach funds held in the United Kingdom and in the United States by the central bank of Nigeria and the bank moved to dismiss. In England, the bank succeeded on the ground that, even though it had a separate juridical personality, it was effectively an arm of the state in regard to monetary matters and therefore entitled to claim sovereign immunity. In the United States, the motion to vacate the attachment was denied on the ground that the plaintiff had presented a *prima facie* case upon its claim and that the plea of immunity should await trial, inasmuch as the fact that the contract had been signed by the Minister of Defense of Nigeria was irrelevant in deciding whether the transaction

⁵⁵ Cass. November 2, 1971, *Clerget v. Banque Commerciale pour l'Europe du Nord*, 6 REV. CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 310 (1972); 99 J. DE DROIT INTERNATIONAL 269 (1972).

⁵⁶ T.F. February 1, 1960, *République Arabe Unie v. Dame X . . .*, R.O. 86 123; 50 AJIL 167 (1961).

⁵⁷ Delaume *supra* note 2, §12.02 text and notes 4-6, §12.03 text and notes 2-7.

⁵⁸ §1611. The other two exceptions concern property used in connection with a military activity and property of certain international organizations. In this last respect, see Delaume, *Public Debt and Sovereign Immunity Revisited*, *supra* note 15, at 538-41.

⁵⁹ DELAUME, *supra* note 2 §11.02 text and notes 15-16. See also, DELAUME, *LEGAL ASPECTS*, *supra* note 11, at 158-59.

⁶⁰ *Trendtex Trading Co. v. Central Bank of Nigeria*, [1976] 1 WLR 868. After this article was written, the Court of Appeal reversed the lower court's decision. [1977] 2 WLR 356, 16 ILM 471 (1977). For further comment on this case, see Higgins, *Recent Developments in the Law of Sovereign Immunity in the United Kingdom*, *infra*, p. 423.

⁶¹ *National American Co. v. Federal Republic of Nigeria*, 420 F. Supp. 954 (S.D.N.Y. 1976), 16 ILM 505 (1977).

involved was commercial or governmental in character. The decision was rendered before the Act took effect. Today, prejudgment attachment of the assets of a central bank would no longer be permissible, at least in the absence of a waiver of immunity,⁶² although an action *in personam* could be brought against the bank. Following recovery of judgment, however, a private claimant might be prevented by §1611(b)(1) from enforcing the judgment against the bank's property. In this respect, the wording of §1611(b)(1) is not entirely satisfactory. This provision refers to property owned by a central bank "for its own account" which, according to the Section-by-Section Analysis, would mean "funds used or held in connection with central banking activities, as distinguished from funds used solely to finance commercial transactions of other entities or of foreign states."⁶³ While this explanation makes clear the intent of the authors of the Act, it fails to account for the fact that central banks hold for their "own" account funds which are intended for commercial or financial purposes, such as the servicing of their own borrowings in the capital market and with regard to which there is no reason to make exception to the non-immunity rule. In other words, the test of "ownership" suggested in the Act is not the determining factor. As in other cases, that factor should be the "nature" of the act performed by foreign central banks.⁶⁴ It is, thus, not excluded that the language of §1611(b)(1) might be the object of judicial interpretation and that the scope of this exception might be kept within bounds consistent with the basic philosophy of the Act.

II.

WAIVERS OF IMMUNITY

In order to avoid, if not to remove altogether, the uncertain impact of sovereign immunity rules upon transnational financial transactions involving sovereigns, lenders have for quite some time⁶⁵ habitually expressly waived their immunity in loan documents.⁶⁶ In so far as American practice is concerned, lenders have had no hesitancy in stipulating waivers of immunity in loan documents involving foreign sovereigns at a time when the effectiveness of such provisions was not a self-evident proposition.⁶⁷ Among recent

⁶² §1611(b)(1).

⁶³ *Supra* note 17, at 116.

⁶⁴ The "ownership" test might be detrimental to private claimants since it raises the same problems of proof of ownership or intended use of the funds subject to execution as was discussed in connection with §1610(a)(2). See *supra* notes 55-57 and accompanying text. It might be extremely difficult for the claimant to establish whether the funds held by a central bank are "for its own account" or the account of third parties, whereas the bank could easily make transfers among accounts and remove its funds from the reach of its creditors.

⁶⁵ At least three decades in American practice. See DELAUME, *LEGAL ASPECTS*, *supra* note 11, at 170, quoting the provisions found in a loan agreement of February 8, 1945 between Chase National Bank of the City of New York and the Kingdom of the Netherlands.

⁶⁶ For a comparative analysis of contractual trends, see DELAUME, *supra* note 2, §§11.07, 12.05, and 12.06.

⁶⁷ Delaume, *Public Debt and Sovereign Immunity*, *supra* note 29, at 745 and *Public Debt and Sovereign Immunity Revisited*, *supra* note 15, at 529.

examples, the following provision is of interest:

Finland will appoint the Fiscal Agent as its authorized agent upon which process may be served in any action arising out of or based on the Notes which may be instituted in any State or Federal Court in New York City by any holder of a Note. Finland will irrevocably waive any immunity from jurisdiction to which it might otherwise be entitled in any action arising out of or based on the Notes which may be instituted by any holder of a Note in any State or Federal Court in New York City or in any competent court in Finland. The Fiscal Agent is not the agent for service for actions brought under the federal securities laws nor does Finland's waiver of immunity extend to such actions; however, the Foreign Sovereign Immunities Act of 1976, which will become effective on January 19, 1977, may provide means of service and waiver of sovereign immunity in such action.⁶⁸

This type of provision compares with those used by lenders in non-American markets, such as Germany⁶⁹ or Switzerland,⁷⁰ the laws of which uphold the binding character of waivers of immunity not only from suit but also from execution, or those which have become increasingly popular in England.⁷¹

⁶⁸ Republic of Finland 7-7/8% External Loan Notes due 1981 (prospectus dated Dec. 3, 1976). See also The Kingdom of Norway 8-1/4% Notes due July 15, 1981 (prospectus dated July 14, 1976).

⁶⁹ New Zealand DM 10 million 7-3/4% Bonds of 1976 providing that New Zealand submits to the jurisdiction of German courts, the courts of New Zealand, and any courts in which New Zealand assets are situated and:

New Zealand waives the right to claim extraterritoriality or immunity from jurisdiction before any Court in which claims can be pursued against New Zealand under this provision and before any agency competent for the enforcement of the law and hereby submits their jurisdiction.

⁷⁰ Københavns Amtskommune (the Copenhagen Country Authority) 5-3/4% 1977-1992 Swiss Fr. 50 million Loan providing for the submission of loan disputes to the Swiss courts, with an option to sue in the Danish courts and "L'Amtskommune waives immunity from suit and execution." (as translated).

⁷¹ Delaume, *supra* note 2, at §§11.02 and 12.02. Recent contractual trends follow the increasing criticism of the English rules (see Mann, *New Developments in the Law of Sovereign Immunity*, 3 Mod. L. Rev. 18 (1973)) and the signing of the Convention by the United Kingdom, *supra* note 2.

See e.g., the following provisions in prospectuses regarding loans issued in England or Eurobonds subject to English law:

(a) Privredna Banka Sarajevo, Kuwaiti Dinars 5 million 9-1/4% Guaranteed Notes due 1982 (issued 1976):

(i) The Notes are governed by and construed in accordance with English law. The Bank hereby agrees that any legal action or proceeding against the Bank with respect to this Note may be brought in the courts of Yugoslavia or in the courts of England as any Noteholder may elect, and by execution and delivery of this Note, the Bank hereby irrevocably submits, for itself and in respect of its property, generally and unconditionally, to the non-exclusive jurisdiction of the aforesaid courts. The Bank further irrevocably consents to the service of process out of the courts of England in any such action of proceedings upon the Chief Representative for the time being of the Yugoslav Economic Chamber in London.

(ii) the Republic (as guarantor of the Notes):

... agrees that, should any Noteholder bring any judicial proceedings in relation to any matter arising under this Guarantee, no immunity from such judicial proceedings or from execution of judgment shall be claimed by or on behalf of the Republic or with respect to its properties.

Provisions of this type show on the part of the draftsman an awareness of existing or prospective rules of sovereign immunity. As mentioned earlier,⁷² waivers of immunity also raise issues of a more general character, since they constitute choice of forum clauses and are subject, like any such clause, to certain limitations regarding the choice of forum and the enforcement of decisions rendered by the agreed forum. These are issues which now deserve consideration.

A. WAIVERS OF IMMUNITY AND SOVEREIGN IMMUNITY RULES

There is no bootstrap magic in any waiver of immunity. In order to be effective, the waiver must be related to the circumstances of each individual case. Certain factors recur, however, with sufficient frequency to permit their identification. Among these is a basic problem of definition, since the nature, commercial or sovereign, of the public debt of foreign sovereigns is an issue which is not uniformly settled. As discussed earlier,⁷³ this problem can be solved by providing an appropriate characterization of the transaction in the loan documents. In the second place, the draftsman must ascertain whether the waiver is likely to be binding upon the borrower. An affirmative answer to this question is now found in the Act⁷⁴ as well as in the Convention.⁷⁵ In the third place, the draftsman must ascertain whether a waiver from immunity from suit necessarily entails a corresponding waiver of immunity from execution or whether the two issues are independent from one another and the waiver should be so drafted as to include both aspects of the question. The answer to this question is not clear.

Under the Convention, a waiver of immunity from suit does not necessarily imply that immunity from execution is waived to the same extent. All that the Convention provides is that a foreign sovereign, once judgment goes against it, is under an obligation to give effect to the judgment.⁷⁶ To the extent that the sovereign complies with that obligation, the issue of immunity from execution would not arise. If, however, the sovereign failed to comply, the private litigant would be left without a remedy.

In this respect, Article 23 of the Convention provides that:

No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Con-

(b) Substantially similar provisions are found in the Banque de Développement Economique de Tunisie, Kuwaiti Dinars 7 million 8-1/2% guaranteed Notes due 1981 (issued in July 1976) guaranteed by the Republic of Tunisia; the Republic of Austria US \$50 million 8-1/4% Bonds 1990 (issued in July 1976); the Kingdom of Denmark US \$10 million 8-1/2% Notes due 1st October 1984 (issued in Sept. 1976); the Banque Nationale d'Algérie, US \$50 million Redeemable Floating Rate Deposit Notes due 1981 (issued July 15, 1976); and the Real Nacional de los Ferrocarriles Españoles (RENFE) 9-1/4% Notes due 1983 (issued Nov. 26, 1976).

⁷² See note 12 *supra* and accompanying text.

⁷³ See *supra* p. 405.

⁷⁴ §§1605(a)(1), 1610(a)(1) and (b)(1), and 1611(b)(1).

⁷⁵ Art. 2.

⁷⁶ Delaume, *supra* note 2, §12.04.

tracting State, except where and to the extent that the State has expressly consented thereto in writing in any particular case.

Under the Convention, therefore, the issue of immunity from execution cannot be disposed of solely by relying upon a waiver of immunity from suit. It must be dealt with separately and specifically in the loan documents.

To a certain extent, the Act conforms to the solutions prevailing under the Convention. Under the Act, waivers of immunity from suit do not necessarily extend to immunity from execution, unless the latter immunity is "expressly" waived by the foreign sovereign.⁷⁷ This general rule is, however, subject to an exception of great practical significance when it is established that the property of the foreign sovereign "is or was used" for the commercial activity upon which the claim is based.⁷⁸

This last expression may be construed as implying that, to the extent that the foreign borrowings of a state are treated as "commercial" transactions (which, of course, would be the case if the matter of definition had been taken care of in drafting the waiver),⁷⁹ no further waiver of immunity from execution would be necessary. Whether this interpretation is correct or not, it should nevertheless be recalled that the Act makes a distinction between the assets of the foreign borrower subject to execution, depending upon whether the borrower is the foreign state or one of its political subdivisions or an agency or instrumentality of such state or political subdivision. In the first instance, the only assets subject to execution are those "used" in connection with the loan.⁸⁰ In the second instance, execution could be levied on all the property in the United States of the borrowing agency.⁸¹ The reasons for this distinction are not clear. In practice, however, the distinction would mean that, unless the loan to a foreign state or one of its political subdivisions is specifically guaranteed by a pledge or mortgage of assets, the lender would be deprived of any effective remedy. In concrete terms, the only assets "used" in connection with a foreign loan are likely to be limited to monies supplied to the fiscal agent for debt servicing purposes, which, following a default, are most unlikely to be present at the time execution is sought.

The situation might be different in the case of a loan raised by a foreign agency, since the agency might be responsible on all its assets in the United States, including assets not "used" in connection with the loan. However this may be and until such time as the issue is judicially determined, it may not be improper to suggest that elementary prudence would justify insisting in all cases and regardless of the personality of the borrower upon supplementing a waiver of immunity from suit with a corresponding waiver of immunity from execution.

B. WAIVERS OF IMMUNITY AND JURISDICTIONAL ISSUES

Waivers of immunity share a number of common characteristics with jurisdictional and arbitration clauses commonly found in private loan con-

⁷⁷ §§1610(a)(1), (b)(1), and 1611(b)(1).

⁷⁸ §1610(a)(2) and (b)(2).

⁸⁰ §1610(a)(2).

⁷⁹ See *supra* p. 406.

⁸¹ §1610(b)(2).

tracts. These include possible limitations on the selection of a foreign forum which would "oust" a court from its original jurisdiction and restrictions upon the recognition and enforcement of foreign judgments and awards.⁸²

At the present time, contractual trends, both in the United States and in Europe, show that lenders favor submitting loan disputes to judicial rather than arbitral settlement. In view of the generally relaxed attitude of Continental countries towards party autonomy in the selection of a proper forum and the network of bilateral and multilateral treaties regarding both jurisdictional matters and the recognition and enforcement of foreign judgments and arbitral awards, the choice between one or the other means of settling loan disputes is, to a large extent, a matter of taste.⁸³

So far as the United States is concerned, the total lack of treaty arrangements regarding the mutual recognition and enforcement of judgments⁸⁴ contrasts singularly with the number of arbitration treaties concluded by the United States, including, in addition to treaties of friendship, commerce, and navigation, the New York Convention on the recognition and enforcement of foreign arbitral awards.⁸⁵ There is, thus, some reason to query whether, from the point of view of enforcement, the time has not come to reconsider the traditional approach to the problem and to take into account the possible advantages of arbitral over judicial remedies.

These are remarks of a general character which must be qualified in two respects so far as loans to foreign sovereigns are concerned. In the first place, in respect of governmental loans certain rules exist which may restrict the number of options open to the draftsman. In the second place, the fact that the borrower is a sovereign may supply the draftsman with additional alternatives, which are not available to him in the case of a purely private loan transaction.

(1) *Limitations upon the Choice between Judicial and Arbitral Settlement of Loan Disputes.*

There are two basic factors which may have a restrictive influence upon

⁸² DELAUME, *supra* note 2, Chs. VI-X and XIII.

⁸³ *Id.*

⁸⁴ See e.g., the Österreichische Kontrollbank Aktiengesellschaft 8% Guaranteed Notes, due October 1, 1988, guaranteed by the Republic of Austria (prospectus dated Sept. 28, 1976):

The Fiscal Agency Agreement contains a submission by the Bank to the jurisdiction of the Federal and State courts in New York, New York, with respect to any legal action by any person, and an appointment by the Bank of the Fiscal Agent as its authorized agent upon which process may be served in any such action. The Fiscal Agency Agreement provides that such submission does not preclude the institution of such actions elsewhere, including the Republic of Austria.

The Notes and the Guarantees provide that they shall be governed by and interpreted in accordance with the laws of the State of New York. Dr. Otto Ortner, Austrian counsel for the Bank, and Dr. Peter Avancini, Austrian counsel for the Underwriters, have advised that such choice of law would be respected by the courts of Austria. However, in original actions brought in Austrian courts, questions of procedural law and, under certain circumstances, questions of public policy, would be governed by Austrian law. Also it will not be possible to enforce in an Austrian court a judgment of a United States court.

⁸⁵ 21 UST 2517, TIAS No. 6997, 330 UNTS 3.

the draftsman's decision to provide for the judicial settlement of loan disputes or for arbitration. One factor is the perennial problem of acquiring jurisdiction over a foreign sovereign and serving upon it notice of process. The other factor concerns the arbitrability of government contracts.

In most countries, serving process upon a foreign sovereign is an almost impossible task if the sovereign is determined to remain uncooperative.⁸⁶ Although the Act⁸⁷ and the Convention⁸⁸ both afford private claimants the means to overcome the sovereign's resistance, the best way to solve the problem remains, both in the United States and in Europe, to reach agreement with the borrower regarding the place where, and the persons upon whom, process may be served. Failing such agreement, a waiver of immunity may be of little practical value and the gates of the judiciary may remain as closed to the plaintiff as those of the sovereign's embassy. Early perception of this situation may rule out the choice of a judicial forum and bring in arbitration.

Arbitration, however, has also its own limitations, since in many countries, government contracts are not arbitrable. When this is the case, arbitration is out and recourse to the courts is the only option left to the draftsman. However, a number of countries either impose no restriction upon the arbitrability of government contracts or hold that limitations on arbitrability apply only to domestic transactions and do not prevent the state or public agencies from submitting their transnational contracts to international arbitration. If the borrower is one of these countries or a public agency thereof, arbitration may be, in again as a possible alternative to the judicial settlement of loan disputes.⁸⁹

These are issues which circumscribe the options open to the draftsman. Another option is to have recourse to a modern method of settling disputes between foreign states and private claimants, which is now available under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).⁹⁰

(2). *An Additional Option: Arbitration under the ICSID Convention.*

The ICSID Convention has been signed by 72 states and ratified by 67 of them. In a nutshell, the Convention provides a machinery for the settlement of legal disputes arising out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated by that state) and a national, whether a physical or juridical person, of another Contracting State. Under the Convention, a state and a private investor who is the national of another Contracting State may agree in writing that any dispute between them arising out of the investment shall be submitted to conciliation or arbitration under the auspices of the International Centre for Settlement of Investment Disputes.

⁸⁶ DELAUME, *supra* note 2, §11.09.

⁸⁷ §1608.

⁸⁸ Art. 16.

⁸⁹ DELAUME, *supra* note 2, §13.05.

⁹⁰ 17 UST 1270, TIAS No. 6090, 575 UNTS 159, 60 AJIL 892 (1966). See also DELAUME *supra* note 2, Appendix II.

This is not the place to review in detail the many interesting features of this Convention, which have been the object of an abundant literature.⁹¹ For the purposes of the present discussion it suffices to say that the major advantages of the Convention are twofold. In the first place, the Convention expressly acknowledges the binding character of agreements between private persons and foreign states to submit to conciliation or arbitration under the auspices of the Centre. Once given, such consent cannot be withdrawn unilaterally.⁹² In the second place, the Convention contains a number of provisions that are intended to make sure that the proceedings will not be frustrated by the unwillingness of a party to cooperate. In general terms, these provisions relate to the institution of the proceedings, the conduct of the proceedings, and the recognition and enforcement of arbitral awards.

In regard to the institution of the proceedings, the Convention neatly solves the problem of service of process. It provides that requests for arbitration should be addressed in writing to the Secretary General of the Centre who shall send a copy of the request to the other party. An official and effective channel of communications between the parties is thus established at the outset.⁹³

With regard to the conduct of the proceedings, the Convention contains a number of rules of procedure intended to permit the proceedings to go on in the event that one of the parties fails to appear or to cooperate and allows awards to be rendered by default.⁹⁴

Finally, when an award is rendered, whether by default or not, the Convention provides that the award shall be final and binding upon the parties and that each party must abide by and comply with the terms of the award.⁹⁵ The Convention therefore binds both parties, including the state

⁹¹ See e.g., Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 136 REC. DES COURS 333 (II, 1972). A bibliography of publications concerning the ICSID Convention is currently available at the ICSID headquarters, 1818 H Street, N.W., Washington, D.C. 20433.

⁹² Art. 25(1).

⁹³ Art. 36(1).

⁹⁴ Arts. 44 and 45.

⁹⁵ Art. 53(1). See e.g., the following provision in Yen Bonds of the Kingdom of Denmark Series No. 1 (1976) (prospectus dated Nov. 1976).

Except as to the authorization relating to the issuance by the Kingdom of the Bonds and matters concerning the creation, validity and enforcement of security provided for in "Clause 6. Matters Relating to Security or Guarantee," the Bonds, the form and substance of the Bond certificates and interest coupons and all the rights and obligations of all the parties concerned, including the Bondholders, arising thereunder shall in all respects be governed by the laws of Japan. Except as otherwise provided in the Conditions of Bonds, the place of performance of obligations pertaining to the Bonds is Tokyo.

Any legal action relating to the Bonds, Bond certificates, interest coupons and the Conditions of Bonds may be brought against the Kingdom in the Tokyo District Court, to the jurisdiction of which the Kingdom hereby expressly and unconditionally and irrevocably submits. Any such action may also be brought against the Kingdom in any competent court of the Kingdom. To the extent that it is legally able to do so, the Kingdom hereby irrevocably waives any sovereign immunity to which it might otherwise be entitled in any such action. The Kingdom has designated its Embassy in Tokyo, Japan, as the address for the purpose

party to the dispute, to give effect to the award. In addition, the Convention requires that all Contracting States recognize and enforce awards rendered within the framework of the Convention.⁹⁶

The prerequisites to recognition and enforcement of an award are made as simple as possible. Under the Convention, any party to an arbitral award may obtain recognition or enforcement of the award by furnishing to the competent court or authority designated for the purpose by each Contracting State a copy of the award certified by the Secretary General of the Centre.⁹⁷ The simplicity and effectiveness of this solution are made even more apparent when it is noted that the obligation of each Contracting State to give effect to an award is unconditional and that no state can invoke public policy as a ground for nonrecognition or refusal to enforce an award.

In the circumstances, by having recourse to the arbitral facilities of the Centre, the draftsman would: (i) practically avoid all the problems attendant upon the initiation of proceedings against a foreign sovereign; (ii) solve the basic issue of definition, since consent to the jurisdiction of the Centre would imply that the parties agree to consider the loan as an "investment" and disputes arising thereunder as "investment disputes" within the scope of the Convention; (iii) be assured that consent to arbitration, once given, could not be subsequently revoked; and (iv) reap the benefit of an exceptionally simple machinery for the recognition and enforcement of arbitral awards.

The rules of the Convention contrast most favorably with the quagmire

of accepting service of process in Japan in connection with any such action instituted in the Tokyo District Court and appointed its Ambassador from time to time to Japan as the authorized agent to accept such service of process. So long as any of the Bonds or interest coupons remains unpaid, the Kingdom shall take any and all actions that may be necessary to effect and continue such designation and appointment in full force and effect.

If a bondholder were to take a legal action against the Kingdom in Japan to recover the principal (and premium, if any) of and interest on the Bonds and obtain a final and conclusive judgment in a Japanese court of appropriate jurisdiction, the bondholder could present the judgment to the Minister of Finance of the Kingdom by transmitting it to the Ministry of Foreign Affairs of the Kingdom through a diplomatic route. If the judgment were related to the payment of a specific amount of money under the Bonds, such amount of money would be paid out of an appropriate account of the budget of the Kingdom.

There are no statutory provisions in the Kingdom relating to the recognition of judgments of a Japanese court. Thus, if a bondholder who has obtained a judgment in a Japanese court wants to obtain a judgment legally enforceable in the Kingdom, he would have to pursue this action in a competent court of jurisdiction in the Kingdom in the same way as a bondholder without any such judgment and submit such Japanese court judgment as evidence. In such proceeding, the Danish court will give full consideration to such Japanese court's judgment. A judgment rendered against the Kingdom in an action brought by a bondholder in a Danish court is enforceable against general assets of the Kingdom.

... The Kingdom is one of the signatory states to the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States." A dispute concerning the Bonds may not be arbitrated in accordance with the said convention without a written consent of the Kingdom. The Kingdom is obliged under the convention to enforce within the Kingdom the pecuniary obligations imposed by an arbitration award rendered pursuant to the convention as if it were a final judgment of a Danish court.

⁹⁶ Art. 54(3).

⁹⁷ Art. 54(2).

that confronts the draftsman under existing rules of sovereign immunity and the ordinary procedural and jurisdictional rules applicable to transnational litigation.

In one respect, however, the Convention falls short of supplying the draftsman with the ultimate satisfaction that would put his quest for certainty to rest. The Convention fails to provide a waiver of immunity from execution. On the contrary, it provides explicitly that the procedures set forth in regard to the recognition and enforcement of awards shall in no way "be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."⁹⁸ In view of the differences among legal systems on this particular issue, it is possible that arbitral awards rendered under the Convention might be subject to a different treatment in Contracting States.

This solution could not be avoided, since attempting to formulate in the Convention a rule of nonimmunity from execution would have run into almost unanimous opposition on the part of states, including both developed and less developed countries.⁹⁹ It is not necessarily as regrettable as it might appear. The fact that, in adhering to the Convention, Contracting States do not surrender their rights to immunity from execution in no way relieves them of their obligations under the Convention. In particular, it is clear that, if a Contracting State party to a dispute invoked, in its own courts or in the courts of another Contracting State, immunity from execution in order to frustrate the enforcement of an award, that state would violate its obligation to comply with the award and would be exposed to various sanctions and, in particular, to suit in the International Court of Justice by the government of the national party to the dispute.¹⁰⁰ In this respect, therefore, the Convention, although it does not purport to change existing rules of immunity from execution, nevertheless imports a new spirit in the manner in which the rules of the game are to be applied.

III.

CONCLUSION

Both the Act and the European Convention significantly improve the situation of private claimants, including lenders, involved in contractual disputes with foreign sovereigns. Under the Act (but not the Convention), the issue of basic concern remains in the final analysis the uncertainty that arises from the absence of a clear definition of the concept of "commercial activity" sufficient to deprive a foreign state of the defense of immunity and to subject it to the jurisdiction of the local courts.

Both the Act and the Convention, however, afford private claimants contractual means to curtail the adverse consequences of the remnants of immunity rules. The Act and the Convention provide new incentives to stipulating waivers of immunity in international loan contracts.

⁹⁸ Art. 55.

⁹⁹ Broches, *supra* note 91, at 403-04.

¹⁰⁰ Art. 64.

Whether such waivers should continue to take the form of submissions to the jurisdiction of courts of law or are to be framed in the context of arbitration machinery is an open question. Traditional ways of thinking, finding additional support in the Act and the Convention, may favor the first alternative. New developments in the law of transnational arbitration may, however, provide new material for reconsideration of a perennial problem. Only the future can tell which of these two possible alternatives may ultimately emerge as the best means of solving transnational loan disputes involving foreign borrowing sovereigns.

RECENT DEVELOPMENTS IN THE LAW OF SOVEREIGN IMMUNITY IN THE UNITED KINGDOM

By Rosalyn Higgins *

The last eighteen months have witnessed very significant changes in the interpretation and application of the doctrine of sovereign immunity by the English Courts. These changes are important not only as matters of historical and practical interest, but because they address many of the fundamental policy questions in a manner that has been unnecessary in U.S. practice because of the way in which the Tate Letter¹ has channelled the development of the law along certain set patterns.

Until very recently the English Courts had followed a doctrine of absolute immunity irrespective of claims made against foreign sovereigns. The two most celebrated authorities² in favor of the absolute theory of immunity were *The Parlement Belge* and *The Porto Alexandre*. In *The Parlement Belge*³ the Court of Appeal, overruling Sir Robert Phillimore as judge of first instance,⁴ had granted immunity to a mail packet owned by the King of the Belgians and officered by commissioned officers of the Belgian Navy. Referring to the "absolute independence of every sovereign authority" the Court of Appeal spoke of immunity of "the public property of any state which is destined to public use."⁵ *The Porto Alexandre*⁶ concerned a vessel owned by the Portuguese Government and used for the carriage of freight. The Portuguese Government claimed immunity in an action for salvage charges (even though the cargo owners entered unconditional appearance) and were successful both before Hill J. and in the Court of Appeal.

The principle of absolute immunity appeared to have been confirmed subsequently on many occasions, although more clearly in respect of actions *in personam* than actions *in rem*. The distinction in English law between actions *in personam* and *in rem* was irrelevant during the period of absolute immunity; was crucial during the recent period of transition; and, as we shall see, appears once again to be losing its significance. So far

* Of the Board of Editors.

¹ 26 DEPT. STATE BULL. 984 (1952).

² Cf. *The Charkieh* (1873) L.R. 4 A & E 59 where a claim of immunity by the Khedive of Egypt was rejected by Sir Robert Phillimore, the decision turning in part on the fact that the vessel was chartered to a British subject and engaged in commerce and in part on the nonsovereign status of the Khedive.

³ (1880) 5 P.D. 197.

⁴ (1897) 4 P.D. 129.

⁵ Per Brett L.J. (1880) 5 P.D. 19 at 214.

⁶ [1920] P. 30.

as absolute immunity *in rem* was concerned, *The Jupiter* followed *The Porto Alexandre*. A long line of cases, some predating *The Parlement Belge* and *The Porto Alexandre*, had reaffirmed that a sovereign could not be sued *in personam* in the English Courts.⁷ As recently as 1975, in *Thai-Europe Tapioca Service Limited v. Government of Pakistan, Directorate of Agricultural Supplies*, the Court of Appeal once again asserted that immunity would be granted to a foreign sovereign in an *in personam* action, even where the state had been engaging in commerce. Indeed, Lord Denning spoke of a "general principle . . . that, except by consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages," although certain exceptions existed.⁸

On November 5, 1976, in an historic judgment, the Privy Council started what has proved to be the fascinating process of bringing English law on sovereign immunity into conformity with practice in most other jurisdictions: *The Philippine Admiral*¹⁰ found that immunity did not lie, in an action *in rem*, in respect of a vessel owned by a foreign sovereign where that vessel had been used for purely commercial purposes. Obviously, in order to reach this decision, the Privy Council had to deal with both *The Parlement Belge* and *The Porto Alexandre*. The Privy Council placed crucial importance upon the fact that, in *The Parlement Belge*, the vessel had been used partly, but not principally, for trade. It was thus open for the Court of Appeal in *The Porto Alexandre* (the Court argued in its judgment in *The Philippine Admiral*) to have declined immunity on the grounds that in that case the vessel owned by the Portuguese Government was used solely for commercial purposes to carry freight. In other words, it was not necessary on a proper understanding of *The Parlement Belge* or *The Porto Alexandre* to have been decided as it was; and it wrongly decided.¹¹ Nor was there anything in the earlier *in rem* cases that com-

⁷ [1924] P. 236. For earlier cases that appear on one reading to uphold this proposition, see *The Jassy* [1906] *id.* 207 (where the facts were virtually identical to those of *The Parlement Belge*, with the King of Romania here claiming immunity); and *The Gagara* [1919] *id.* 95.

⁸ E.g., *Mighell v. Sultan of Johore* [1884] 1 Q.B. 149; *Compania Mercantil Argentina v. United States Shipping Board* [1924] 131 L.T. 388; *Bacchus S.R.L. v. Servicio Nacional del Trigo* [1975] 1 Q.B. 438; *Swiss Israel Trade Bank v. Government of Malta* [1972] 1 Lloyd's Reports 497; *United States and France v. Dollfus Mieg et Cie. and Bank of England* 1952 A.C. 582 (H.L.).

⁹ [1975] 1 WLR 1492. Lord Denning formulated the following exceptions: First, "a foreign sovereign has no immunity in respect of land in England." Second, "a foreign sovereign has no immunity in respect of trust funds here or money lodged for the payment of creditors." Third, "a foreign sovereign has no immunity in respect of debts incurred here for services rendered to property here." Fourth, "a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts." *Id.* 1490-91. On this last point, see *infra* p. 435.

¹⁰ [1976] 2 WLR 214, 70 AJIL 364 (1976).

¹¹ [1976] 2 WLR 225. The Privy Council said it would not follow *The Porto Alexandre* because (1) it had been decided because its members (wrongly) thought they were bound so to decide by *The Parlement Belge*, (2) three of the five Law Lords in *The Cristina* [1938] A.C. 485 thought it was doubtful whether sovereign

pelled a different view, as, notwithstanding that immunity had been granted in each of them, the point (*i.e.*, the position in respect of a vessel used solely for trading) had not been taken.¹² Nor did later cases preclude the Privy Council from taking its present view.¹³

In *The Philippine Admiral*, the vessel, though owned by the Republic of the Philippines, was found to have been used only in private trading. The Privy Council nonetheless went out of its way to insist that it was leaving the law regarding actions *in personam* untouched; the Court of Appeal had "regularly accepted" the immunity of a foreign sovereign on a commercial contract and this was assumed to be law "even by Lord Maugham in *The Cristina*."¹⁴ The Privy Council went on to say: "It is no doubt open to the House of Lords to decide otherwise but it may fairly be said to be at the least unlikely that it would do so."¹⁵

It has not taken long for the Court of Appeal to refuse to grant immunity in an *in personam* action, although only for Lord Denning was the essential ratio that immunity no longer obtained in respect of the commercial acts of sovereigns. In the case of *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*,¹⁶ the Court of Appeal on January 13, 1977 gave judgment in favor of the plaintiffs, rejecting a claim of sovereign immunity by the defendants. Because of the overordering of cement by the government of General Gowon and the congestion that had been caused in Port Harcourt and Lagos, the new Nigerian Administration had taken certain actions. Among those were instructions given to the Central Bank of Nigeria not to pay against commercial letters of credit presented by Trendtex, which had entered into a contract with Pan-African, an English Company, to supply cement. Pan-African in turn had contracted to sell the cement to the Nigerian Ministry of Defence. The Central Bank of Nigeria issued

immunity should extend to state-owned vessels engaged in ordinary commerce, (3) the trend of world opinion was against absolute immunity *in rem*, (4) "their Lordships themselves think that it is wrong that it should be so applied. In this country—and no doubt in most countries in the western world—the state can be sued in its own courts on commercial contracts into which it has entered and there is no apparent reason why foreign states should not be equally liable to be sued there in respect of such transactions." [1976] 2 WLR 232.

¹² *The Jassy*, [1906] A.C. 207 was, said the Privy Council "indistinguishable from *The Parlement Belge*" (224); and in *The Gagara* [1919] A.C. 95 the question whether the ship was being used for merely trading purposes and that immunity should be refused on that ground "was not taken at all" (224).

¹³ In *The Cristina* [1938] A.C. 485, although immunity was granted (in circumstances that in this writer's view are open to criticism), "the question whether a sovereign state can claim immunity in an action *in rem* against a ship employed by it solely for trading purposes was never in issue at all" (226). In *The Sultan of Johore v. Abubakar Tunku Aris Bendahar* [1952] A.C. 318, the Privy Council had declared the issue an open one; and MacKenna J. in *Swiss Israel Trade Bank v. Government of Salta* [1972] 1 Lloyd's Rep. 497 had also left open the question of whether a state-owned vessel used wholly or substantially for trade was immune from English jurisdiction.

¹⁴ [1976] 2 WLR 233; referring to [1938] A.C. 485.

¹⁵ [1976] 2 WLR 233.

¹⁶ [1977] 2 WLR 356, 16 ILM 471 (1977).



Letters of credit which were passed along the line to Trendtex. Consignments sent by Trendtex in October 1975 were not paid for by the Midland Bank which was acting as agent of the Central Bank of Nigeria and had not itself confirmed the credit; nor was payment made against the presented documents for demurrage in respect of time lost in discharging due to the congestion at Lagos. In November 1975, Trendtex issued a writ in the High Court in London against the Central Bank of Nigeria, claiming, *inter alia*, demurrage on the six vessels which had been sent and the price of the cement shipped under the October shipments. The Central Bank of Nigeria applied to set aside the writ on the ground that the Central Bank is a department of the state and immune from suit. Donaldson J., sitting as judge of first instance in the Queen's Bench Division, had held that the principle of sovereign immunity applied.¹⁷ In the Court of Appeal, Lord Denning, having traced the traditional English doctrine of absolute immunity, noted how the sway of the doctrine of restrictive immunity had grown around the world in the last fifty years. Referring to recent decisions in Belgium, Holland, the Federal Republic of Germany, and the United States, and citing particularly the *Dunhill Case*,¹⁸ along with the European Convention on State Immunity of 1972,¹⁹ and the new U.S. Foreign Sovereign Immunities Act of 1976,²⁰ he asked rhetorically, in that unmistakable style which so bears his imprint:

Seeing this great cloud of witnesses, I would ask: Is there not here sufficient evidence to show that the role of international law has changed? What more is needed? Are we to wait till every other country save England recognizes the change? Ought we not to act now? Whenever a change is made someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. England should not be left behind on the bank.²¹

¹⁷ [1976] 1 WLR 868. He held that, although the Central Bank was incorporated by statute as a separate legal entity and without express provision as to its status as a department of state, this was not, following the judgment of Jenkins L.J. in *Bacchus S.R.L. v. Servicio Nacional del Trigo* [1957] 1 Q.B. 438 at 467, conclusive as to immunity. He found further that immunity was to be granted as the main functions of the Bank were to issue and control the national currency, to handle exchange control, and to act as state treasury: these functions made it the alter ego and a department of the state. One can, of course, agree with Jenkins L.J.'s point in *Bacchus* without following Donaldson J. in believing that function *generally* is a relevant test. It will be seen that Donaldson J. was not concerned with functions in the sense of identifying the nature of the particular transaction (which was clearly on that test commercial), but with the general role of the Bank unrelated to the transaction in question. Counsel in this case were: F. P. Neill Q.C., C. French Q.C., M. Pickering, Professor D. P. O'Connell (for the plaintiffs); and T. Bingham Q.C., and Professor A. Guest (for the defendants).

¹⁸ *Alfred Dunhill v. Republic of Cuba*, 96 S.Ct. 1854.

¹⁹ 11 ILM 470 (1972); and see the excellent article by Sinclair *The European Convention on State Immunity*, 22 ICLQ 254 (1973).

²⁰ 28 USC §§1331-32; 1602-11, Pub. L. 94-583, 90 Stat. 2891, 15 ILM 1388 (1976). See also *Official Documents* section, *infra* pp. 595-601.

²¹ [1977] 2 WLR 356 at 367.

Noting that in *The Philippine Admiral*, the Privy Council had already accepted the restrictive theory in respect of actions *in rem*, and observing that the Privy Council had proclaimed it "unlikely" that the House of Lords would apply the restrictive rule to actions *in personam*, Lord Denning roundly declared: "That is a dismal forecast. It is out of line with the good sense shown in the rest of the opinion of the Privy Council."²² He convincingly suggested that the policy reasoning of the Privy Council in favor of the restrictive view was of general application and applied as much to actions *in personam* as to actions *in rem*. It was his clear view that, international law now having developed in favor of the restrictive rule, no immunity should be granted to the defendant. He somewhat reluctantly addressed himself to whether the Central Bank of Nigeria "should be considered in International Law"²³ a department of the Federation of Nigeria" and concluded that it should not; but made it clear that "I prefer to rest my decision on the ground that there is no immunity in respect of commercial transactions, even for a government department."²⁴

Both Stephenson and Shaw L.JJ. believed that "the preponderant contemporary rule of international law supports the principle of qualified or restrictive immunity which takes account not only of the sovereign status of a party but also of the nature of the transaction in respect of whether the issue of immunity arises."²⁵ All three judges dealt in detail with both possible ratios: the status of the Bank on the one hand, the restrictive principle of immunity on the other. Lord Denning denied the claim of immunity on both grounds, but was clearly uneasy with the former and relied essentially on the latter. Shaw L.J. relied equally on both; while Stephenson L.J., although agreeing that contemporary international law pointed towards a restrictive view of immunity, felt that the Court of Appeal was for the moment precluded from giving effect of this view. He thus rejected the immunity claim of the Bank solely on the grounds that it was not an organ of the government.

Both these aspects—the freedom of the Court of Appeal to give effect to a "changed" rule of international law and the relevance of the status of a defendant in an immunity claim—clearly merit further comment.

Only a government or a department or agency of government has sovereign status entitling it to claim immunity. To that extent status is clearly

²² *Id.* 367.

²³ A somewhat singular formulation. Assuming that the defendant's status is relevant at all (on which see below, *infra* p. 432), is the test whether *international law* would regard the defendant as a department of government? Or is this not, beyond the obvious question of good faith, a matter for the forum? Cf. the formulation by Stephenson L.J.: "is the Bank, controlled as it now is by the Government of Nigeria, the sort of body which the law of nations, or if it differs, the law of this country, recognises as entitled to the immunity which it accords to a sovereign state?" (*Id.* 374) This writer believes the robust view of Shaw L.J. on this point is to be preferred. The task, he declares, may be made somewhat easier by taking into account the view of the government but "it does not relieve a court before which the issue of sovereign immunity arises of the responsibility of examining all the relevant circumstances." (*Id.* 383) He makes no reference to any status "under international law."

²⁴ *Id.* 371.

²⁵ *Id.* 385.

relevant. The negative proposition that nonsovereign entities, not acting as agents of the sovereign, have no claim to sovereign immunity, is beyond dispute.²⁶ In times of absolute immunity, status as sovereign or as agent of the sovereign has been crucial. And because so often the case law has arisen in the context of immunity claims by state-trading entities,²⁷ it has been but a short slide to the proposition that, in a system of qualified immunity, status remains a relevant factor. But why should it be? At the heart of the restriction today lies a distinction made between acts (of a party *prima facie* entitled to claim immunity) which are public and acts which are private. The sovereign, acting commercially, loses the protection of immunity both in actions *in rem* and *in personam*. As a matter of logic it therefore follows, in asserting whether a state-trading or nationalized corporation is entitled to immunity, that no automatic immunity flows from the fact that it may be a department of state; the nature of the transaction is here the key test. There are reasons of policy as well as of logic why this should be so. In the *Trendtex* case the Court of Appeal, in disagreeing with Donaldson J. on the status of the defendant, made much of the fact that the Government of Nigeria had had the option of "signalling" in the Enabling Statute the alleged sovereign status of the Bank but had failed to do so. Pointing to the growing practice of limiting immunity to acts *jure imperii*, Lord Justice Stephenson said: "It might therefore have been thought necessary, as it certainly would have been prudent, to take the first step requisite for obtaining sovereign immunity for the Bank's acts by according it in statutory terms a status which qualified for that immunity."²⁸ Donaldson J. and Stephenson L.J. shared the view that finding of nonsovereign status was essential if they were to be able to deny immunity to the Central Nigerian Bank, no matter how purely commercial its functions. Psychologically there has always thus been pressure on the bench to square a finding on status with a finding on function.²⁹ Thus Donaldson J. had found the Bank's functions to be public functions, though to make this finding he had to rely on functions in general and not on functions in respect of the particular transaction; while Stephenson and Shaw L.JJ., finding the specific function (refusal to pay on letters of credit) commercial then had to find that the Bank was not a department of state. And Lord Denning, in a case in 1971,³⁰ had stated: "If the Corporation is part and parcel of the government of New Brunswick—so much so as to be identified with it like a government department—it can clearly

²⁶ See *The Charkieh* (1873) L.R.A. & E 59.

²⁷ *Krajina v. Tass Agency* [1949] 2 AER 274; *Bacchus S.R.L. v. Servicio Nacional del Trigo* [1957] 1 QB 438; *Swiss Israel Trade Bank v. Government of Salta and Banco Provincial de Salta* [1972] 1 Lloyd's Rep. 497. In *The Philippine Admiral* the Privy Council noted that in *Bacchus* the Court of Appeal was divided as to whether the defendants were a department of state, but "none doubted for a moment that if they were so to be regarded they were entitled to immunity" [1976] 2 WLR 216 at 223.

²⁸ [1977] 2 WLR 375.

²⁹ See *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1976] 1 WLR 86, at 876-77.

³⁰ *Mellenger v. New Brunswick Corporation* [1971] 1 WLR 606.

claim immunity."³¹ But he went on to emphasize that the Corporation was carrying out government functions.³² In *Trendtex* Lord Denning and Shaw L.J. found that the findings of commercial functions would have been enough to disallow the immunity claim (though they did in fact find that the Bank was not a department of the government).³³ Lord Denning persuasively pointed to the great difficulty in deciding (once it was agreed that the certificate of the foreign ambassador was not binding on the matter, which remained for decision by the English Court)³⁴ whether or not an organization is a department of state. There were many criteria, often pulling in different directions, which might be regarded as relevant.³⁵ And, it may be added, if the "signalling" to which Stephenson L.J. alluded is really significant, it would be easy for governments in the future to make reference to sovereign status in statutes setting up trade agencies, in the hope that this would assist them in gaining immunity even in respect of commercial transactions.

It must be appreciated that English Courts find themselves locked in this dilemma at the moment because, until the matter reaches the House of Lords, the lower courts see difficulty in simply overruling the longstanding doctrine of absolute immunity in respect of actions *in personam* against a sovereign. Emphasis on status has thus been seen by the lower courts as a way of mitigating the rigors of the absolute rule without presuming to disagree with established precedent. The Court of Appeal in *Trendtex* referred in some detail to the alternative doctrines of transformation and incorporation of international law into domestic law. Stephenson L.J. observed that there had been somewhat contradictory lines of precedent, some supporting the view that every court could apply the relevant contemporary rule of international law,³⁶ others suggesting that absolute immunity *in personam* was still binding until the House of Lords departs

³¹ *Id.* 609.

³² A shift to function as the relevant test is to be seen in the thoughtful judgment of MacKenna J. in *Swiss Israel Trade Bank v. Government of Salta and Banco Provincial de Salta* [1972] 1 Lloyd's Rep. 497. Here the defendant Bank functioned as an ordinary commercial bank but in addition exercised certain official functions. Although the absolute immunity rule in respect of an *in personam* action prevailed, MacKenna J. looked to see whether in the exercise of the relevant functions the Bank was independent of government control, and found that it was.

³³ Cf. the earlier statement of Lord Denning in *Rahimtoola v. Nizam of Hyderabad* that a separate legal entity which carried on commercial transactions for the state was an agent, and not an organ, of the government "and was not entitled to immunity" [1958] A.C. 379.

³⁴ *Krajina v. Tass Agency*, [1949] 2 AER 274. Cf. The significantly greater emphasis placed on the role of the foreign attribution by Kerr J. in *Rolimpex v. Czarnikow* [awaiting entry into WLR]. Status was an issue in *Rolimpex* not for a claim of immunity but, conversely, because a Polish state-trading company sought to show sufficient distance from the Polish Government in order to rely on a clause which allowed reliance on *force majeure* in respect of government intervention.

³⁵ [1977] 2 WLR 371 and see *Rolimpex*, *supra* note 34.

³⁶ See *Triquet v. Bath* (1764), 3 Burrow 1481; *Heathfield v. Chilton* (1767), 4 Burrow 2016; *Barbuit's Case*, *Forrester's Cases in Equity* 281; and discussion thereof, [1977] 2 WLR 377.

from its earlier decisions or Parliament repeals the rule.³⁷ Without explicitly saying which doctrine he found persuasive, his Lordship asserted that in any event, for a contemporary rule of international law to be applied, it had to be "proved." It is the "proof" that he required that is perhaps strange to an international lawyer, for he required virtual unanimity by nations and (coming back full circle) acceptance by the English Courts. He finds it significant that it could not be claimed that "no civilized State would repudiate the application of the restrictive doctrine to actions in personam;"³⁸ and he gives weight to the fact that (necessarily at this juncture of time, one would have thought) the doctrine has not "been recognized and acted upon by our country."³⁹ Shaw L.J. was prepared to disagree with Lawton and Scarman L.JJ. in *Thai-Europe v. Government of Pakistan* [1975] 1 WLR 1485, who had suggested that the doctrine of *stare decisis* applied to international law in the English Courts, for this would lead to "the strange result" that, in order to keep pace with developments, "current international law would have to be introduced into English law by statute."⁴⁰ In a persuasive analysis, going beyond Lord Denning's statement of preference for the incorporation theory⁴¹ and reliance on the assertion that "international law knows no rule of *stare decisis*,"⁴² he stated that English law requires:

... that the Law of Nations (not what *was* the Law of Nations) must be applied to the Courts of England. The rule of *stare decisis* operates to preclude a court from overriding a decision which binds it with regard to a particular rule of [international] law, it does not prevent a court from applying a rule which did not exist when the earlier decision was made if the new rule has had the effect in international law of extinguishing the old rule.⁴³

Shaw L.J. was thus able to join Lord Denning in the belief that even if the Central Bank of Nigeria were part of the government of that country, it was "not immune from suit in respect of the subject matter of the present action."⁴⁴

As if, in the move towards a qualified theory of immunity, the intellectual ferment in getting to grips with these problems were not enough, a very recent case has added a new dimension: if the distinction is now to be drawn, in England as elsewhere, between *acta jure imperii* and *acta*

³⁷ See *R. v. Keyn* (1876), 2 Ex. D. 202; and the most celebrated dictum, by Lord Atkin: "So far at any rate as the Courts of this country are concerned, international law has no validity save insofar as its principles are accepted and adopted by our own domestic law" *Chung Chi Cheong v. The King* [1939] A.C. 167. Lord Denning disarmingly notes—before going on to reject this proposition—"I myself accepted this without question in *Reg. v. Immigration Officer, ex. p. Tharkar* (1974), 1 QB 70." [1977] 2 WLR 365.

³⁸ *Id.* 380.

³⁹ *Id.*

⁴⁰ *Id.* 388.

⁴¹ "I now believe the doctrine of incorporation is correct. Otherwise I do not see that our Courts could ever recognise a change in the rules of international law." *Id.* 365.

⁴² *Id.* 365.

⁴³ *Id.* 388.

⁴⁴ *Id.* 389.

jure gestionis, may a government engaging in international transactions claim immunity on the grounds that its *breach* is an *actus jure imperii*? This was the issue at the heart of *1° Congreso del Partido*,⁴⁵ an Admiralty action *in rem* heard in the Queen's Bench Division before Goff J.

The facts in *1° Congreso del Partido* were essentially the same as had given rise to *The Imias*.⁴⁶ In February 1973, when the government of President Allende was still in power in Chile, a Cuban state enterprise (Cubazucar) contracted to sell sugar to a Chilean company (Iansa). Payment was to be made in U.S. dollars, under a letter of credit. Following earlier shipments, two shipments were made in August 1973. The first was on the *Playa Larga*, which flew the Cuban flag and was chartered to Cubazucar by Mambisa, another Cuban state enterprise.⁴⁷ The second shipment was on the *Marble Islands*, which at that time flew the flag of Somalia and was under demise charter to Mambisa from a Lichtenstein corporation. The *Marble Islands* was subchartered to another Cuban state enterprise on behalf of Cubazucar.⁴⁸ Mambisa was in possession of both vessels, as operator and manager.

At the time of the revolution in Chile, on September 11, 1973, the *Playa Larga* was discharging her cargo in the port of Valparaiso, while the *Marble Islands* was still on the high seas, en route to Chile. There were hostilities around the Cuban Embassy in Santiago and at his own request the Cuban Ambassador and staff left Chile. The *Playa Larga* stopped discharging cargo⁴⁹ and, refusing to wait for port clearance, sailed from port pursued by a Chilean destroyer and helicopter. Notwithstanding the firing of shots, the *Playa Larga* left Chilean waters. Instructions were also sent from the Cuban Ministry of Marine to the *Marble Islands* to proceed no further. Both vessels put in at Callao, Peru. The cargo was not discharged at Callao. In the case of the *Playa Larga*, the cargo was discharged in Cuba and sold there. In the case of the *Marble Islands*, the cargo was ultimately presented as a gift to the people of Vietnam.

The *Marble Islands* was purchased by the Republic of Cuba on October 13, 1973, while en route to Haiphong. On September 27, 1973 a Cuban

⁴⁵ Unreported. Counsel in this case were R. Alexander Q.C., B. Rix, and the present writer (for the plaintiffs) and T. Bingham Q.C., and B. Davenport (for the defendants).

⁴⁶ See 68 AJIL 280, 311, 541 (1974).

⁴⁷ Mambisa was described in the charter party as the owner of the vessel but ownership was in fact claimed by the Republic of Cuba.

⁴⁸ The court found that under English choice of law rules the charters were both probably governed by Cuban law, as were the bills of lading.

⁴⁹ The reasons were contested. The Cubans claimed that the Embassy in Santiago came under attack, and that the Ministry of Merchant Marine and Ports then became concerned for the safety of the *Playa Larga* and ordered its withdrawal; which decision the crew unanimously agreed with. The Chilean authorities emphasized the good order in Valparaiso port, the lack of danger there, and the fact that other east European vessels continued unloading after the coup. Goff J. found that both the *Playa Larga* and the *Marble Islands* could have unloaded at Valparaiso, though the decision not to was taken out of concern for the safety of the vessels; whereas the decision not to discharge at Callao was a "political decision taken by the Cuban Government." Transcript, 9.

law, stated to take effect as from September 11, 1973, was promulgated. This declared the decision of the Government of Cuba not to recognize the military junta in Chile and froze all civilian state property.⁵⁰ Both the cargo on the *Playa Larga* and that on the *Marble Islands* had been paid for by the Cuban purchasers.

An arrest was made of a sister ship, which was being built in Sunderland. Proceedings began *in rem* against that vessel on September 9, 1975, claiming damages for breach of duty and/or contract for nondelivery and alternatively damages for wrongful conversion. Mambisa was named as the defendant. Mambisa asked for the writ to be set aside, on the grounds that the *Congreso* was in fact owned by the Republic of Cuba,⁵¹ which was entitled to claim immunity. The writ was amended to join the Republic of Cuba as defendant.

In 1° *Congreso del Partido* the question of "status" did not arise, because no claim of immunity was advanced by Mambisa. Immunity was claimed only by the Republic of Cuba, which asserted ownership of all the vessels. After the decision in *The Philippine Admiral*, which occurred during the extended proceedings in 1° *Congreso*, the defendants ceased to rely on the absolute immunity doctrine;⁵² instead, it was now argued that *The Philippine Admiral* was not applicable, as the action did not arise out of a straightforward commercial dispute. In *The Philippine Admiral*, not only was the vessel used for commercial purposes only but the breach of contract complained of was of a purely commercial nature.⁵³ In the present case, although *The Playa Larga* and *Marble Islands* had been used only for commercial purposes and 1° *Congreso del Partido* was destined to the same use, the failure to deliver cargo was caused by a high policy decision of the Cuban Government. Invoking the availability of immunity for *acta jure imperii*, the Cuban Government claimed to have the writs set aside. Goff J. fairly summarized the arguments of plaintiffs and defendants in the following terms:

[The defendant] submits that . . . the English Court should set aside the proceedings, because the alleged tort or breach of contract in both cases arose as a result of a governmental act of the Republic of Cuba. A governmental act is, he submits, an *actus jure imperii*. The mere fact that it may result in a breach of trading contract will not deprive it of that status; . . . [the plaintiff] puts his case in two ways. First

⁵⁰ Cuba Law No. 1256.

⁵¹ From the detailed arguments on ownership, see Transcript, 11-12, 21-26.

⁵² By the time judgment was handed down, the Court of Appeal had given judgment in *Trendtex*, making it clear that the restricted doctrine of immunity applied *in personam* as well as *in rem*. Further, there was now confirmation by the Court of Appeal of the findings of the Privy Council (with its somewhat uncertain status in matters of precedent, with House of Lords' decisions existing to the contrary) so far as actions *in rem* were concerned. Nonetheless, in an interesting passage *obiter*, Goff J. explained why he would in any event have felt free to reject *The Porto Alexandre*. In a passage that contrasts most interestingly with the approach of Lord Denning and Shaw L.J. in *Trendtex* (though reaching the same conclusion) he relied on the reasoning of Lord Parker C.J. in *Smith v. Leech Brain & Co. Ltd.* [1962] 2 Q.B. 405 at 415-6.

⁵³ [1976] 2 WLR 214.

he submits that, once the ship arrested has been categorized as an ordinary trading ship, there can be no plea of sovereign immunity in respect of an action *in rem* against that ship, provided the claim arose in respect of that ship or in respect of a sister ship which is also an ordinary trading vessel. Second he submits that, where the act complained of takes place in the context of a commercial transaction, for example if it is a claim for damages for breach of an ordinary trading contract, then it matters not that the purpose or motive for the act complained of was a matter of state policy; an action *in rem* against an ordinary trading ship will not in such circumstances be set aside on grounds of sovereign immunity.⁵⁴

Although the distinction between *acta jure imperii* and *acta jure gestionis* was accepted in most of the leading Western jurisdictions,⁵⁵ the case law provided little guidance to the point at issue. For the issue was not only "how does one distinguish between public and private acts?" (which has previously underlain virtually every U.S. case since the introduction of the Tate Letter), but "what acts does one look to in making the distinction?" Although there was a wealth of case law available to assist on the former point,⁵⁶ past decisions had failed to direct themselves to the latter question.⁵⁷ The plaintiffs contended that one common factor stood out in the vast array of case law on the *imperii/gestionis* distinction: that an act had never been classified as falling in the one category rather than the other by looking at the breach, still less the motive for the breach.⁵⁸ They urged that it was the *transaction* that fell to be determined, not the breach thereof.⁵⁹ This, they argued, was necessarily so, otherwise the restrictive doctrine of immunity became meaningless; a sovereign, having gone into

⁵⁴ Transcript, 28.

⁵⁵ Affidavit evidence of foreign law in a variety of jurisdictions was accepted by the court.

⁵⁶ Close attention was paid to *Victory Transport Inc. v. Comisaria General* 336 F.2d 354 (2d. Cir. 1964); *National City Bank v. Republic of China* 348 U.S. 356 (1955); *New York and Cuba Steamship Co. v. Republic of Korea*, 132 F. Supp. 684; *Dunhill v. Republic of Cuba*, 96 S.Ct. 1854 (1976); *Cabotent v. National Iranian Oil Co.* 9 ILM 152 (1970); *Empire of Iran Case* (30 April 1963, BVerf GE 16); *The Charente* (Nyett Juridiskt Arkivl, 1942); and *Trendtex v. Central Bank of Nigeria*, (Frankfurt Comm. Ct, No 3/8 0.14/76, 1975). The 1962 European Convention on State Immunity and the 1976 U.S. Foreign Sovereign Immunities Act were also examined. Goff J. rejected the plaintiff's arguments on S. III of *Dunhill* and also noted that S. III only represented the views of four members of the Supreme Court: Transcript, 36. Cf. Lord Denning's reliance on *Dunhill* in *Trendtex*. [1977] 2 WLR 367.

⁵⁷ In large part, the plaintiffs claimed, because in these circumstances a government was really making an act of state defense and had not hitherto been thought to be making assertions relevant to an immunity claim.

⁵⁸ Conceptually distinct was the question of purpose or motive in the making of a transaction. The U.S. Foreign Sovereign Immunities Act 1976 makes clear that this is not relevant to a classification of an act as "commercial or otherwise." See *supra* note 20, §1603(d). See also Lord Denning in *Trendtex*, who rejected as relevant to a claim for immunity the fact that the cement purchased was to be used for building army barracks. [1977] 2 WLR 369.

⁵⁹ Parallel arguments were also made in tort to cover the claim of wrongful conversion, i.e., that it was the nature of the relationship that fell to be determined and not the tortious act.

the marketplace, would in fact always be able to claim immunity by ensuring that his breach of contract/tortious act was motivated by high state purpose and not mere commercial convenience.

However, Goff J. preferred the arguments of the defendants on this point, putting it this way:

If the nature of the contract is such that it is itself an *actus iure imperii*, then any claim under it may be the subject of sovereign immunity. If it is itself an *actus iure gestionis*, then an ordinary breach of the contract cannot be the subject of a claim to immunity, but the character of the contract cannot necessarily preclude a breach from being held to result from an *actus iure imperii*, in which event sovereign immunity may be claimed in respect of the breach.⁶⁰

Goff J. stated that even after entering the marketplace a sovereign does not cease to act as a sovereign. He asserted, in a comment that would perhaps surprise many readers of this *Journal*, that if a sovereign "for reasons of state" ordered one of his trading ships to intercept another ship on the high seas and a collision resulted "it would be very surprising if in such circumstances immunity could not be claimed."⁶¹ In an interesting aside, he suggested that not only would the assertion of jurisdiction in such a case be inconsistent with the power and dignity of the sovereign, but that the claims "would be more appropriately dealt with through diplomatic channels."⁶² England, lacking the constitutional doctrine of separation of powers, has never experienced a tradition comparable to that in the United States of judicial deference to the Department of State in immunity questions. Indeed, under an absolute doctrine of immunity it was a nonissue and it is significant to see Goff J.'s remark coming so soon after the introduction into English practice of the restrictive doctrine.

In an important *dictum*, Goff J. denied that certainty in commercial transactions was the real reason why the doctrine of sovereign immunity is restricted. The true reason, he said, was simply that immunity is not granted where the sovereign does not act as such.⁶³ But in deciding to breach a commercial contract, he may be acting as a sovereign.

The plaintiffs had further argued that one of the reasons why the case law had not addressed itself to whether the breach by a sovereign could transmute a commercial transaction back into an *actus iure imperii* was because the breach of the government was properly to be regarded as an act of state. As such, said the plaintiffs, it was a defense to the merits (which would have to meet the international law requirements for a successful plea of act of state). It was not an act which required an English Court not to assume jurisdiction at all. Goff J. found that "[i]t is not enough to say that he can, if necessary, plead act of state by way of defence."⁶⁴ Notice of appeal has been entered, and it remains to be seen how the Court of Appeal will treat these absorbing questions.

⁶⁰ Transcript, 35.

⁶¹ *Id.* 33.

⁶² *Id.* 32.

⁶³ *Id.* 33.

⁶⁴ *Id.* 31. He offered two grounds for this view: first, that "such a plea will in any event depend upon the extent to which the defence is recognized in the relevant

There were many subsidiary issues in this complex case that must be beyond the scope of this note.⁶⁵ However, two further issues may be singled out for mention, being of general interest to the developing law of sovereign immunity: the questions of territorial connection and of title.

There have been some *dicta* in English cases which raise the question whether an absence of real connection between the subject matter of the dispute and the forum should be a factor in deciding whether to accede to a claim of sovereign immunity. The suggestion has been made that, unless such a real connection be shown, English Courts ought to accede to the demand of the foreign sovereign that the writ be set aside. In *Rahimtoola v. Nizam of Hyderabad* [1958] A.C. 379 Lord Denning, in advancing the view that the nature of the dispute is the proper test for deciding on immunity, said that if the dispute concerns "the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity."⁶⁶ He went on to emphasize in *Thai-Europe Ltd. v. Pakistan Government* that by this phrase he did not simply mean that the plaintiffs must succeed in bringing the case within the jurisdictional rules of the Supreme Court.⁶⁷ Rather:

I mean that the dispute should be concerned with property actually situated within the jurisdiction of our courts or with commercial transactions that have a most close connection with England, such that, by the presence of the parties or the nature of the dispute, it is more properly cognizable here than elsewhere . . . None of the transactions here occurred within the territorial jurisdiction of those courts. They are as far off as the moon. Here a state corporation in Pakistan agreed to buy fertilizers from a firm in Poland . . . I can see no possible justification for these courts asking the government to come here to contest the claim.⁶⁸

This is really the language of *forum conveniens*, although Lord Denning seems to tie his observations to sovereign immunity notions. One may wonder why, if application to serve out of the jurisdiction has properly been granted under Order 11, rule 1, and if in those circumstances a

jurisdiction"; and second, that "the whole purpose of the doctrine of sovereign immunity is that the domestic courts of a foreign state should not even take cognizance of a dispute in which a foreign sovereign is impleaded." *Id.*

⁶⁵ These included questions relating to the freedom of the Court not to follow *The Porto Alexandre*; the admissibility of evidence of foreign law; the significance for the central point of the Brussels Convention of 1926; the requirements of good faith in relation to the drawing on the letters of credit when the goods had not been delivered; whether the problem of Mambisa's title should be tried as an issue in the actions; and—a point of considerable interest to the English commercial Bar and in respect of which Goff J's judgment is very closely reasoned—the correctness or otherwise of *The Andrea Ursula* [1971] 1 Lloyd's Rep. 145.

⁶⁶ Italics added [1958] A.C. 379 at 422.

⁶⁷ Order 11, rule 1. R.S.C. deals with circumstances in which service out of the jurisdiction may be allowed.

⁶⁸ [1975] 1 WLR at 1492.

private corporate defendant would be required to contest the action in England, a sovereign engaging in trade should be given the extra protection of a "real connection" being needed before immunity will be disallowed.⁶⁹

Although there is no requirement of international law that immunity be granted in respect of commercial transactions which do not have direct territorial connection with the forum, other jurisdictions have sometimes taken a similar position.⁷⁰

In 1° *Congreso del Partido* Goff J. dealt with this in a forthright manner. Directly addressing himself to Lord Denning's *dicta*, he thought there was no international consensus on the requirement of territorial connection. Further, in neither *Rahimtoola* nor in *Thai-Europe* was the court directly concerned with an assertion of jurisdiction arising out of the arrest of an ordinary trading ship. Noting that "the arrest of ships is a procedure widely recognized throughout the world," and that a court may thereafter proceed on grounds of *forum conveniens*,⁷¹ Goff J. also observed that collisions on the high seas appear to fall within the proper assertion of jurisdiction under Article 1 of the Brussels Convention of 1926. Stating that an English Court should be able to assert jurisdiction in such a case,⁷² as it should to an action *in rem* against a foreign state-owned trading ship in connection with an arrest in respect of a carriage of cargo claim, he continued:

Jurisdiction asserted by means of an arrest of a ship is not an exorbitant jurisdiction. By allowing his ships to trade, a foreign sovereign must be taken to have exposed his ships to the possibility of arrest, a procedure which is widely accepted among maritime nations and which is regulated to some extent by international convention . . .⁷³

The learned judge was also required to decide whether, for the purposes of a claim to sovereign immunity, the Republic of Cuba had established a sufficient title to the *Congreso*. English Courts have over the years moved away from the view that mere assertion of title by the foreign sovereign requires that the Court decline jurisdiction.⁷⁴ In *Juan Ismael & Co. Inc. v.*

⁶⁹ For perceptive criticisms on this ground, see Markesinis, A "Breeze" of Change in the Law of Sovereign Immunity, 1976 CAMBRIDGE L.J. 198. In *Rahimtoola*, the proper law of the contract was English, providing a sufficient ground under 0.11 rule 1 for service out of the jurisdiction.

⁷⁰ Thus, lack of "real connection" was a strong factor in *The Imias*, *supra* note 20, at 312. But see the trenchant criticism on this point among others, of Monroe Leigh. *Id.* 280. The new U.S. Immunities Act, in its definition of "commercial acts" in fact appears to circumscribe nonavailability of immunity to acts having a substantial territorial connection with the forum: *See supra* note 20, §1605(a)(2). Cf. however, the specific rejection of this as an "additional requirement" by the Frankfurt Commercial Court in the suit that Trendtex brought before it against the Nigerian Central Bank, Dec. 20, 1975, *supra* note 56. Note also that §1605(b) does not stipulate the need for any territorial connection "in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state. . . ."

⁷¹ The leading English case is *The Atlantic Star* [1974] A.C. 436.

⁷² The United Kingdom is in fact not a party.

⁷³ Transcript, 41.

⁷⁴ *The Jupiter* [1924] 236.

The Government of Indonesia,⁷⁵ the Privy Council had held that the foreign sovereign must show that its claim was not merely illusory, nor founded on defective title. In the earlier case of *Dollfus Mieg* [1952] A.C. 582, however, Lord Radcliffe had stated that the principle of immunity forbade the Court from inquiring into the title of gold bars, when title was very much at issue. In *1° Congreso* the Court objected to the plaintiff's contention that the *Juan Ismael* principle had no place in an era of qualified immunity. It did not accept that, under the doctrine of restrictive immunity, it would be necessary for a defendant sovereign to do more than show that its title was not "merely illusory."⁷⁶

Trendtex has yet to go to the House of Lords and *1° Congreso* to the Court of Appeal. But it is clear that legal issues of great principle are involved, going beyond the facts of the cases themselves; and the manner in which these issues are decided will be of importance both to the law of sovereign immunity and to our understanding of the interplay of international law with national law in more general terms.

⁷⁵ [1954] 3 WLR 531.

⁷⁶ Transcript, 20-21.

LITIGATION OF SOVEREIGN IMMUNITY BEFORE A STATE ADMINISTRATIVE BODY AND THE DEPARTMENT OF STATE: THE JAPANESE URANIUM TAX CASE

*By Charles N. Brower **

When President Nixon and Prime Minister Tanaka of Japan held a summit meeting in Hawaii on August 31–September 1, 1972, doubtless no one expected they were laying the foundation for one of the most curious sovereign immunity cases in the annals of American jurisprudence. The resulting communique, however, which placed the leaders' seal of approval on extensive Japanese purchase commitments in the United States, became the basis for a Japanese claim that half a billion dollars worth of enriched uranium subsequently purchased by ten Japanese utilities from the Atomic Energy Commission (AEC) and stored on its reservation in Oak Ridge, Tennessee enjoyed sovereign immunity from local commercial property taxes. The Japanese claim, apart from posing a diplomatic issue between Japan and the United States, embroiled the Department of State and the AEC (and its successor, the Energy Research and Development Administration (ERDA)) with each other and with the Department of Justice, threatened controversy between Tennessee and Washington, and eventually resulted in the Japanese utilities' settling the matter for \$4.5 million. Although the settlement deprived posterity of a decision on the issue, this unique case remains not simply an entertaining episode but also a useful lesson in defense against claims of sovereign immunity. While the Foreign Sovereign Immunities Act of 1976¹ was intended substantially to eliminate the role of the Department of State in sovereign immunity disputes, the Act could not have been successfully invoked in this case, even had it been in effect, as related below.

I.

FROM HAWAII TO OAK RIDGE: THE FACTUAL BACKGROUND OF THE URANIUM TRANSACTION

The Nixon-Tanaka Joint Statement actually said no more than that:

The Prime Minister [of Japan] indicated that the Government of Japan would also try to promote imports from the United States and

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¹ Pub. L. No. 94-583, 28 USC §1, 90 Stat. 2891, 15 ILM 1388 (1976). See also *Official Documents* section, *infra* pp. 595-601.

that it was the intention of the Government of Japan to reduce the imbalance to a more manageable size within a reasonable period of time.²

The reference was to the then current imbalance in trade between the two countries, which was adverse to the United States. A detailed statement regarding the uranium transaction itself was contained in the September 1, 1972 official "Announcement on Talks Between [U.S.] Ambassador Robert Ingersoll and Deputy Vice Minister for Foreign Affairs Kiyohiko Tsurumi,"³ which stated the intention of Japanese business and, to a more limited extent, the Japanese Government itself, to make extraordinary purchases of at least \$1 billion worth of American goods and services. The announcement listed expected Japanese purchases of \$390 million in "agricultural, forestry and fishery products," \$50 million worth of "special grains purchases," purchases by the "Government of Japan" of "helicopters and aviation-related facilities" amounting to \$20 million, purchases by "Japanese commercial airlines" of "civil aircraft, including wide-bodied aircraft" valued at approximately \$320 million,⁴ and concluded:

The Japanese power companies will purchase \$320 million in uranium enrichment services from the United States with payment to be facilitated by the Government of Japan.⁵

The "Japanese power companies" referred to, ten in number, constitute the entire electrical utility industry in Japan and are strictly private. As was admitted in extensive answers to interrogatories submitted by the Japanese power companies in administrative proceedings in Tennessee,

In broad general terms the corporations are similar to public utilities organized under the laws of one of the states of the United States of America for profit.⁶

Accordingly, each of the Japanese utilities pays various national, prefectural, and municipal taxes, including taxes on profits, registration and license.

² Text of a Joint Statement Following Meetings Between Prime Minister Kakuei Tanaka and President Richard Nixon at Kuilima, Oahu, Hawaii, Aug. 31-Sept. 1, 1972, 67 DEPT. STATE BULL. 331 (1972).

³ *Id.* 332.

⁴ These were undoubtedly the purchases by All Nippon Airways of Lockheed L-1011 Tristar jetliners, which involved allegedly improper payments by Lockheed of \$12.6 million to private persons and public officials in Japan and which have led to the arrest of 15 persons in Japan, including former Prime Minister Tanaka. See N.Y. Times, July 27, 1976, at 1, col. 4; TIME, Aug. 9, 1976, at 23.

⁵ "Enrichment services" refer to the process whereby a quantity of uranium is "enriched" to include a higher percentage of the isotope U235 than is normally present, rendering a much more productive fuel source. The uranium material subjected to this process is commonly referred to as "feed material." Generally the AEC would sell pre-produced enriched uranium in return for a stated price per "separative work unit" of enrichment services and delivery to the AEC of an equivalent amount of "unenriched" uranium feed material.

⁶ Answers of Appellants to Interrogatories of Appellee, City of Oak Ridge, No. 42, *In re Chubu Electric Power Co., Inc.*, (Assessment App. Comm'n, Tenn. Bd. Tax Equal., May 28, 1976) (hereinafter cited as Answers to Interrogatories).

tees, stamp duties, real estate taxes, and levies on depreciated fixed assets; and each is subject to suit and civil process in Japan.⁷ Likewise, each raises capital by the issuance and sale of stock, which (with the sole exception of the Japan Atomic Power Company) is publicly traded on exchanges, and each is authorized to and, in most cases actually does, pay dividends. All of them have bylaws and are operated by directors elected by the shareholders and responsible for the management of the company, which in turn elects corporate officers.⁸ As in the United States, these utility companies are subject to governmental regulation, including audits and supervision of the use of nuclear materials.⁹ It was expressly conceded that the Japanese companies were formed to generate and distribute electric power for profit, that for these purposes they have individual paid-up capitalizations ranging from more than \$100 million to in excess of \$1 billion, and that they are neither subdivisions nor otherwise a part of the Government of Japan.¹⁰

The Japanese utilities had in fact been purchasing enrichment services from the AEC for years. Prior to the implementation of the Nixon-Tanaka summit communique, the companies had purchased \$600 million worth of such services.¹¹ As required by U.S. law,¹² these purchases were subject to a governmental cooperation agreement signed February 26, 1968, and subsequently amended.¹³ Indeed, as announced by the Chairman of the AEC at the time of the summit communique, the \$320 million of enrichment services in question were "already covered in the present U.S.-Japan Agreement for Cooperation."¹⁴ Thus the proposed purchases were nothing novel; they constituted only an acceleration of purchases which ultimately would have been made in any event.

As is classically the case, the proposed acceleration rested on a coincidence of interest. The United States desired a rapid infusion of Japanese money into the U.S. economy to rectify the substantially adverse trade balance. The AEC was unabashedly in the business of marketing enrichment services and had substantial preproduced stocks of enriched uranium available for disposition.¹⁵ The Japanese Government was not averse to assisting the U.S. Government, particularly if there was a potential advantage to Japan. That advantage, although not widely recognized, was very substantial.

The \$320 million in question was applied to the purchase of ten million "separative work units" of enrichment services at a unit price of \$32. As

⁷ *Id.*, Nos. 44, 45, 47, 57.

⁸ *Id.*, Nos. 13-15, 18, 19, 23, 24, 28-30, 34-36.

⁹ *Id.*, No. 58.

¹⁰ *Id.*, Nos. 2, 5, 9, 22.

¹¹ AEC Press Release No. P-269 (Sept. 1, 1972).

¹² Atomic Energy Act of 1954, 42 U.S.C. §2153.

¹³ Agreement for Cooperation with Japan Concerning Civil Uses of Atomic Energy, Feb. 26, 1968, [1968] 4 UST 5214, TIAS No. 6517, *as amended*, Feb. 24, 1972, [1972] 1 UST 275, TIAS No. 7306, March 28, 1973, [1973] 2 UST 2323, TIAS No. 7758 (hereinafter cited as Cooperation Agreement).

¹⁴ AEC Press Release No. P-269 (Sept. 1, 1972).

¹⁵ *Id.*

of August 20, 1975, approximately three years following the summit accord, the unit price had advanced to \$53.35,¹⁶ and there was evidence that the world market price as of early 1976 was as much as \$75-\$100.¹⁷ Thus the Japanese utilities, which did not actually purchase the enrichment services until 1973, enjoyed over a period of two years an increase of \$21.35 in the value of each of the ten million units, or a total of \$213,500,000, an increase which many believe was foreseeable at the time of purchase.¹⁸ Indeed, this foreseeability raises the possibility that the Nixon Administration may have wanted through this purchase arrangement to assuage Japanese feelings, which had been severely injured by the successive "Nixon shocks" of the New Economic Policy instituted August 15, 1971,¹⁹ and the presidential visit to the People's Republic of China, which had been announced in July 1971²⁰ and carried out in February 1972.²¹

Two difficulties with the proposed transaction troubled the Japanese utilities and were resolved through governmental cooperation. While the Japanese utilities understandably desired to have the advantage of the lower current price for enrichment services which they ultimately would require in any event, they also preferred not to incur the substantial carrying charges for financing such a substantial purchase. Likewise, they did not wish to acquire uranium feed material to supply to the U.S. Government as replacement for the enriched uranium they had purchased until actual utilization was imminent. The Japanese Government solved the first of these difficulties by financing the entire \$320 million purchase through its own Export-Import Bank.²² The second difficulty was eliminated by an agreement between the utilities and the AEC that, although the utilities would take immediate title to the enriched uranium at Oak Ridge at the stipulated unit price, the material would not be released to the Japanese for transportation and utilization until substitute feed material was provided; hence the enriched uranium would be stored at the Oak Ridge reservation as security pending such substitution.

Following the summit announcement and a meeting between officials of the Ministry of International Trade and Industry of Japan and the AEC,²³ negotiations took place by correspondence and in person in late 1972 and

¹⁶ Record at 136, *In re Chubu Electric Power Co., Inc.*, (Assessment App. Comm'n, Tenn. Bd. Tax Equal., May 28, 1976) (hereinafter cited as Appellate Record); Record at 20-21, *State ex rel. Haddock v. Chubu Electric Power Co.*, No. 9370 (Roane County Ch., Tenn., Dec. 1, 1975) (hereinafter cited as Trial Record).

¹⁷ *Id.*

¹⁸ See *BUSINESS WEEK*, Dec. 22, 1975, at 15, 16; *Wall St. J.*, Oct. 28, 1975, at 1, col. 4.

¹⁹ 65 DEPT. STATE BULL. 253 (1971); *N.Y. Times*, Aug. 16, 1971, at 1, col. 8.

²⁰ 65 DEPT. STATE BULL. 121 (1971); *N.Y. Times*, July 16, 1971, at 1, col. 8.

²¹ United States-People's Republic of China: Joint Communiqué, Feb. 28, 1972, 11 ILM 443 (1972).

²² Answers to Interrogatories, *supra* note 6, No. 59.

²³ See Minute of Japan-U.S. Discussions on Availability of Enrichment Services to Japan (on file at the offices of ERDA).

early 1973 between the utilities themselves and the AEC,²⁴ resulting in the execution by each of the ten utilities of a Sale Agreement and a Storage Agreement with the AEC. Each Sale Agreement referred to the purchaser, e.g., The Chubu Electric Power Company, Incorporated, as the "Customer," and provided that following completion of enrichment services "Title to such enriched uranium shall pass to the Customer upon delivery as aforesaid."²⁵ The Sale Agreements further provided that "risk of loss of or damage to the enriched uranium shall pass with title," but provided further, as indicated above, that the "Customer" could not acquire actual possession of the enriched uranium until it was replaced by the relevant amount of feed material.²⁶ Each Sale Agreement further provided that "The General Terms and Conditions attached hereto are hereby made a part of this agreement,"²⁷ and the attached terms and conditions in turn provided in detail for arbitration of disputes "in accordance with the rules established by the American Arbitration Association," with such arbitration to be the exclusive remedy except with respect to "consideration of law questions."²⁸ The terms and conditions also embraced two further provisions relevant to the later claim by the Japanese Government to sovereign immunity:

The Customer shall . . . comply with all applicable laws, regulations and ordinances of the United States and any State, territory or political subdivision.²⁹

This Agreement shall be construed in accordance with the internal Federal law applicable in the United States District Courts to agreements to which the Government of the United States of America is a party.³⁰

Virtually identical provisions were included in the Storage Agreements executed by the ten utilities pursuant to which the AEC agreed to store the enriched uranium upon completion of the services and transfer of title and the Japanese "Customers" agreed to indemnify the AEC for "any and all damages, liabilities, and costs arising out of or in connection with the storage of the Customer's material hereunder. . . ."³¹

II.

BEHOLD THE TENNESSEE TAX COLLECTORS!

One of the incidental aspects of the Oak Ridge case is the insight it gives into the functioning of a "company town." The great bulk of Oak

²⁴ See Memorandum on Behalf of the Embassy of Japan in Support of a Suggestion of Immunity, filed with the Department of State on Jan. 19, 1976, at 11-12, (hereinafter cited as Memorandum of Japan).

²⁵ E.g., Agreement for Advance Sale of Uranium Enrichment Services, Feb. 6, 1973, between ERDA and The Chubu Electric Power Company, Incorporated, Art. II(2) (on file at the offices of ERDA).

²⁶ *Id.*, Arts. II(2), (3).

²⁷ *Id.*, Art. X(1).

²⁸ *Id.*, General Terms and Conditions, para. 7.

²⁹ *Id.*, para. 11.

³⁰ *Id.*, para. 15.

³¹ E.g., Storage Agreement between ERDA and The Tokyo Electric Power Co., Inc., Feb. 8, 1973, paras. 2, 5, 9(a), 10, 13 (on file at the offices of ERDA).

Ridge inhabitants are employed at the atomic energy facilities there, in many cases as employees of Union Carbide Corporation, the government contracting agent. Necessarily, a substantial number of the same people are involved in, or at least interested in, the functioning and financing of local government. Financing of municipal services has long been a sore subject, since the vast portion of potentially taxable property within the jurisdiction is immune as government property. It is a fair assumption that the local populace, which has a high average educational level and accordingly demands public services of high quality, is alert to new sources of revenue. The same is true of Roane County, in which a portion of the federal reservation is located. Thus it came to the notice of the town fathers at the end of 1974 that a number of stored canisters of special nuclear materials bore stenciled Japanese company names rather than the familiar emblem of the AEC.

In May of 1975 Roane County moved first, citing the utilities to show cause why they should not be assessed for unpaid commercial personal property taxes for the year 1974. The utilities unsuccessfully litigated the matter before the Roane County Trustee. In September 1975 the Roane County Property Assessor likewise levied an assessment for 1975. The utilities unsuccessfully resisted that assessment before the Roane County Board of Equalization. In the meantime, the City of Oak Ridge, in July 1975, also issued a notice of assessment of back taxes for the year 1974 and, when challenged by the utilities, successfully defended the assessment before the City of Oak Ridge Board of Equalization. An August 1975 Oak Ridge assessment for 1975 taxes was likewise upheld by the same board, notwithstanding a challenge by the private utilities. The total amount of taxes sought to be collected by the two jurisdictions was \$15,400,920.20.

While these various proceedings were pending, the taxing jurisdictions, concerned about the ultimate collectibility of the taxes, persuaded the local chancery court to attach all the enriched uranium stored on the federal reservation in the name of the Japanese utilities. Writs were first issued on behalf of Roane County and shortly thereafter on behalf of Oak Ridge.³² The writs gave rise to near comic opera scenes when local authorities attempting to effect attachment were rebuffed by federal authorities on the ground that they did not have appropriate security clearances to enter the federal reservation.³³ The utilities finally moved to quash the writs and dismiss the suits on October 28, 1975, the same day that the final rulings were given by local authorities upholding the tax levies.

It was only four days earlier, on October 24, 1975, that the Japanese Government, after some initial inquiries and protestations, formally submitted a diplomatic note to the Department of State requesting that

The Department of State . . . suggest the immunity of the enriched uranium presently stored in Roane County, Tennessee, from ad

³² State *ex rel.* Roberts v. Chubu Electric Power Co., No. 9362 (Roane County Ch., Tenn., Dec. 1, 1975).

³³ See Washington Post, Sept. 25, 1975, at 1, cols. 1-3.

valorem taxes levied by Roane County and the City of Oak Ridge, to the Chancery Court for Roane County, Tennessee, and to any other court or administrative agency before which the matter may be brought or may be pending.³⁴

Notwithstanding the pendency of this diplomatic request, the ten utilities proceeded to appeal all of the Roane County and Oak Ridge levies to the Tennessee Board of Tax Equalization. The utilities also proceeded to settle the attachment proceedings a little more than a month later by consenting to execution in the event the levies should be upheld and placing in the custody of the court an amount of enriched uranium sufficient to secure payment of the taxes assessed. The consent decree provided that

If the Defendants are ultimately found to be liable for the taxes claimed by the Plaintiffs, and such taxes, including any penalty and interest as may be assessed, are not paid within sixty (60) days from the entry of final judgments, the Court may, subject to applicable Federal law and regulations, order the sale of the enriched uranium being held pursuant to this order in satisfaction of such final judgment.³⁵

As part of this settlement the utilities were permitted to avoid future taxes by reconveying title to the enriched uranium to ERDA, except for the amount placed in the custody of the court, as to which the taxing jurisdictions agreed not to assess taxes in future years.³⁶

III.

THE TACTICAL CONSIDERATIONS

When the Japanese diplomatic note was delivered to the Department of State, Special Counsel were consulted on the question of sovereign immunity by Tennessee counsel representing the taxing jurisdictions. The first tactical consideration was whether it would be desirable to confront the issue first before the Tennessee Board of Tax Equalization or before the Department of State. Perhaps the conclusion to bring proceedings to a head first in Tennessee, if possible, rather than at the Department of State, seems inevitable, but it was not arrived at without some deliberation. The easy assumption that Tennessee taxing jurisdictions would be on more favorable ground in their home state than at the Department of State, where Japan would have first claim on sympathetic attention, was tempered by the belief, confirmed in later proceedings, that state officials tread with some reluctance in areas of State Department expertise and endeavor to treat friendly foreign governments with dignity and fairness.

The more concrete reasons for preferring to proceed first in Tennessee were three-fold. First of all, the law on sovereign immunity appeared to

³⁴ Diplomatic Note of the Embassy of Japan, Oct. 24, 1975 (on file at the offices of the Department of State).

³⁵ State *ex rel.* Roberts v. Chubu Electric Power Co., No. 9362 (Roane County Ch., Tenn., Dec. 1, 1975).

³⁶ *Id.*

be overwhelmingly in favor of the Tennesseans, and the Tennessee Board of Tax Equalization, whose decision would be reviewable by Tennessee courts, including the Supreme Court of Tennessee, is absolutely bound to apply the law. By contrast, there is considerable concern on the part of plaintiffs in such matters that strictly political considerations can and sometimes do enter into decisions of the Department of State on sovereign immunity,³⁷ which of course are not reviewable.³⁸ Secondly, it was felt that if a favorable decision on the merits was first obtained from Tennessee, it would pose one more obstacle for the Department of State to overcome, to the extent that political considerations might enter into the Department's decision. It was perhaps irrelevant, but nonetheless noted, that the national press had not long before indicated that President Ford was seriously considering both of the Tennessee Senators among a short list of possible Vice Presidential candidates for the 1976 elections.³⁹ Thirdly, it was thought wise to try to obtain a Tennessee decision on the waiver aspects of the Oak Ridge case, perhaps preempting the Department of State in an area of state law where its authority is in dispute.⁴⁰ In the last analysis, achieving this priority of proceedings raised no practical problem, since the Tennessee authorities moved rapidly while the Government of Japan consumed a considerable period engaging American counsel on its behalf and making its submission to the Department of State.⁴¹

The Government of Japan apparently judged that its choice should be to proceed at the Department of State first, for it sought to intervene in the appeals before the Tennessee Board of Tax Equalization for the purpose of delaying any decision by the Board.⁴² Oak Ridge and Roane County opposed the motion, not only for the reasons just stated but also out of concern that a decision by the Board to admit Japan as a party to the Tennessee proceedings at that late date might be deemed by the Department of State to constitute an authoritative ruling under Tennessee law that the assertion of sovereign immunity by Japan was timely.⁴³

³⁷ See, e.g., Leigh, *Sovereign Immunity—The Case of the "Imias,"* 68 AJIL 280, 281-89 (1974); Lowenfeld, *Litigating A Sovereign Immunity Claim—The Haiti Case,* 49 N.Y.U.L. REV. 377, 391-95 (1974).

³⁸ See, e.g., *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974).

³⁹ E.g., N.Y. Times, Nov. 4, 1975, at 1, col. 6. Indeed, such speculation continued throughout the length of the proceedings and beyond. E.g., TIME, Aug. 2, 1976, at 12; TIME, Aug. 9, 1976, at 7, 14-15.

⁴⁰ See p. 450 *infra*.

⁴¹ Following delivery of its Diplomatic Note, the Japanese Embassy was informed by the Department of State of its informal procedures for considering and determining claims of sovereign immunity, which included an opportunity for both parties to submit written briefs and make oral presentations, either directly or through counsel. Nelson, *Contemporary Practice of the United States Relating to International Law*, 64 AJIL 631, 650 (1970).

⁴² See Motion of the Embassy of the Government of Japan to Intervene, filed with the Assessment Appeals Commission of the Tennessee Board of Tax Equalization on December 23, 1975.

⁴³ See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §71(2) (1965).

The first basis for attacking the motion to intervene was the fact that the motion papers had been signed only by counsel and not by a diplomatic or other officer of the Government of Japan empowered to assert the claim in that proceeding. This objection was premised on most respectable authority, commencing with the decision of the United States Supreme Court, per Mr. Justice Storey, that not even a consular official of a foreign power is competent to assert a claim of sovereign immunity on behalf of his government in the absence of extrinsic proof of governmental authorization.⁴⁴ The rationale for this requirement of strict proof of authority had been stated by Judge Learned Hand:

To assert the immunity is a step involving possible political consequences, since the sovereign so declares his unwillingness to accept the decision of the courts of a friendly power. This he may be unwilling to do. On the other hand, it is unfair to private litigants that they should be deprived of a trial through the intervention of one whose authority the sovereign may rightly repudiate, or merely by a suggestion which falls short of a claim of right. Therefore nothing short of a claim made by intervention as a suitor will serve, and obviously this can be done only by some one authorized to assert the sovereign's prerogative.⁴⁵

The Supreme Court had held specifically that signature by private counsel was inadequate evidence of authority⁴⁶ and two Circuits had explicitly held that the rule applies whether or not the defendant is truly governmental or is in fact a private corporation.⁴⁷ This was an argument, however, of seemingly limited utility, since the defect could be quickly remedied by an affidavit of the Japanese Ambassador.

The second, more substantive objection to Japanese intervention was that of timeliness. Courts have consistently held that once a general appearance is entered on behalf of the defendant, the defense of sovereign immunity has been waived.⁴⁸ It had been expressly confirmed that the rule applies regardless of whether the general appearance had been made by the allegedly immune corporate party or the foreign government itself.⁴⁹ It

⁴⁴ *The Anne*, 16 U.S. (3 Wheat.) 435, 445-46 (1818); *accord*, *The Sao Vicente*, 260 U.S. 151 (1922); *Victory Transport Inc. v. Comisaria General*, 336 F.2d 354, 358 n.7 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); *The Secundus*, 13 F.2d 469, 472 (E.D.N.Y. 1926).

⁴⁵ *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc.*, 300 F. 891, 892-93 (S.D.N.Y. 1924), *aff'd*, 32 F.2d 195 (2d Cir.), *cert. denied*, 280 U.S. 579 (1929). *See also* *Heaney v. Spain*, 445 F.2d 501, 502 n.1 (2d Cir. 1971) (Friendly, C.J.); *Harris & Co. Advertising v. Cuba*, 127 So.2d 687, 688-89 (Ct. App., 3rd Dist., Fla. 1961).

⁴⁶ *Ex Parte Muir*, 254 U.S. 522, 527 (1921).

⁴⁷ *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc.*, 32 F.2d 195, 200 (2d Cir.), *cert. denied*, 280 U.S. 579 (1929); *The Sao Vicente*, 295 F. 829, 831-32 (3rd Cir. 1924).

⁴⁸ *Victory Transport Inc. v. Comisaria General*, 336 F.2d 354, 358 n.7 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); *The Sao Vicente*, 281 F. 111 (2d Cir.), *aff'd*, 260 U.S. 151 (1922), *related case*, 295 F. 829, 831, 833 (3rd Cir. 1924).

⁴⁹ *The Uxmal*, 40 F. Supp. 358 (D. Mass. 1941). *See also* *Flota Maritima Browning de Cuba v. Motor Vessel Ciudad*, 335 F.2d 619, 625 (4th Cir. 1964).

was argued that the utilities had entered general appearances below and joined issue on the merits, to the extent of obtaining release of most of their property in the attachment proceedings by posting security pursuant to a consent judgment.

Conscious that the Tennessee Board of Tax Equalization, with somewhat informal procedures, might be reluctant to deny a friendly foreign power its "day in court" no matter how persuasive the authorities, the taxing jurisdictions offered to consent to the appearance of the Japanese Embassy as *amicus curiae* without any of the attributes of a party. The Japanese Embassy did not tender the necessary proof of authority, nor did it further seek to support its petition for intervention, but instead accepted the offer to appear as *amicus curiae*, doubtless conscious that in that status, too, it would have a full opportunity to suggest to the Tennessee Board of Tax Equalization that it stay its hand and await a ruling from the Department of State. Thus while avoiding any Tennessee ruling which might constitute a finding that Japan had asserted its sovereign immunity defense in a timely fashion, and gaining a tactical victory, the Tennessee taxing jurisdictions were still faced with the necessity of persuading the Tennessee Board of Tax Equalization to move ahead.

Counsel for the Government of Japan quite naturally appealed to the Tennessee Board to defer to the special expertise of the Department of State and not to engage in a possibly futile act, *i.e.*, to reach a decision which might ultimately be vitiated by State Department action. The Government of Japan suggested to the Board that whatever action the Department of State might take would be binding on the Board and encouraged the Board to accept memoranda on this point and delay a decision in the meantime.⁵⁰

The Tennessee taxing jurisdictions appealed for Board action on three grounds. First, they disputed the assertion that State Department action would inevitably be binding and suggested that to require them to take a present position as to the legal effect of a decision not yet rendered by the Department of State would be like requiring a putative defendant to answer an unfiled complaint. It was also suggested that the Government of Japan might want to think better of the matter, since it doubtless would prefer not to preclude itself from arguing in Tennessee in the future that a decision of the Department of State unfavorable to it was not binding. Secondly, the Tennesseans appealed frankly to the equities of the situation, pointing out how much time, effort, and briefing had already been invested in contesting the matter and that it was necessary for the taxing jurisdictions to learn as soon as possible what their proper assessments and expectable revenues might be for purposes of future planning. Thirdly, the taxing jurisdictions had some legal authority on their side. The Supreme Court had pointed out that proceedings at the Department of State and before an administrative agency or judicial tribunal might be pursued independently and simultaneously without the right of the sovereign to

⁵⁰ Appellate Record, *supra* note 16, at 14-22.



immunity, if it exists, being waived or otherwise prejudiced.⁵¹ The U.S. Court of Appeals for the Fifth Circuit had expressly held that a foreign sovereign's right to immunity, if otherwise properly asserted, was not abridged by a district court allowing the plaintiff to proceed before it while the foreign government's request for State Department intervention was pending.⁵² Indeed, Judge Herlands had suggested that both diplomatic and judicial routes should be pursued simultaneously in order to avoid needless and harmful delay, pointing out that, should the court stay its hand pending possible developments at the Department of State at the request of the government instituting proceedings there, the result could be justice delayed and therefore denied.⁵³

Here, too, the result was somewhat anticlimactic. The Board declined to obligate itself not to decide the case prior to determination by the Department of State but equally did not obligate itself to anticipate the Department. Since the Government of Japan had suggested only a delay in decision, but not a delay in the actual hearing of the appeal by the Board, the case proceeded to hearing and argument on the merits which, with one important exception noted hereafter, were advanced in approximately the same fashion as later submitted to the Department of State.

IV.

INSURING AGAINST A "POLITICAL" DECISION

No one defending against a claim of sovereign immunity before the Department of State can afford to overlook the possibility that, protestations of strict adherence to the Tate Letter⁵⁴ notwithstanding, political factors may enter into the Department's decision. Indeed, one Legal Adviser of the Department, while a private practitioner, criticized the Department because in certain cases⁵⁵ "the executive obviously was acting contrary to the precepts of international law espoused in the Tate Letter" and failed "to exercise the juridical function of applying the law of sov-

⁵¹ *Ex Parte Peru*, 318 U.S. 578, 588-89 (1943).

⁵² *Irvin v. Quintanilla*, 99 F.2d 935, 939 (5th Cir. 1938), *cert. denied*, 306 U.S. 635 (1939).

⁵³ *Pan American Tankers Corp. v. Vietnam*, 391 F. Supp. 49 (S.D.N.Y. 1968).

⁵⁴ Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General, 26 DEPT. STATE BULL. 984 (1952). The Tate Letter announced that thenceforth the United States would no longer follow its previous practice of automatically allowing immunity as to any sovereign despite the nature of the matter in dispute and would instead apply the "restrictive" theory denying such immunity with respect to commercial transactions. This policy was adopted in light of the increased tendency on the part of foreign countries to conduct business abroad through governmental entities rather than through private companies and the consequent trend of other countries to adopt such restrictive theory. *Id.* For a comprehensive review of both historical and present United States practice in the field of sovereign immunity, see Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U.L. REV. 901 (1969).

⁵⁵ *E.g.*, *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24 (4th Cir. 1961); *Chemical Natural Resources, Inc. v. Venezuela*, 420 Pa. 134, 215 A.2d 864 (1966).

oreign immunity free from the distorting effect of political considerations." He concluded that "so long as the power of decision with respect to immunity is lodged in a political agency such as the State Department, political considerations are likely to prevail over considerations of international law in the hard cases."⁵⁶

Sensitive to this unavoidable fact, and conscious that the Japanese Government was relying on the asserted intentions of President Nixon and Prime Minister Tanaka, counsel considered the available means to maximize the possibility that the decision would be rendered strictly according to the law. Consideration of tactics necessarily focused on strengthening the hand of the Legal Adviser, who would be presumed by virtue of his office and its history to favor a decision on the legal merits, against any political considerations at a higher level. The coincidentally unique situation of the then Deputy Secretary of State, Robert S. Ingersoll, who was both the former American Ambassador to Japan involved in the negotiations surrounding the Nixon-Tanaka summit and the State Department official who forwarded to Congress the legislative proposal subsequently enacted as the Foreign Sovereign Immunities Act of 1976, partially dictated the appropriate means. A letter was addressed to Deputy Secretary Ingersoll (which is reproduced in the Annex to this article) carefully delineating the concern of the Tennesseans and the policy imperatives requiring that the Department adhere strictly to the Tate Letter. The Japanese Government was informed of the correspondence and invited, if it desired, to comment. Counsel for the Japanese Government responded promptly and forthrightly, stating in unmistakable terms in a letter (also reproduced in the Annex to this article) that the Government of Japan expected and intended to be bound by the standards of the Tate Letter:

[T]he Japanese Government is not asking that the Department abandon precedent or depart from the restrictive theory to issue a suggestion of immunity in this case.

Thus was the possibility of political intrusion as effectively foreclosed as is humanly possible. The authorized agent of the Japanese Government had executed a warrant accepting the recommendation to be made by the Legal Adviser.

V.

HAVING YOUR CAKE AND EATING IT TOO

From the outset of the case, counsel for the Tennesseans had to balance the need to make the case of maximum strength before both the Tennessee Board of Tax Equalization and the Department of State with the need to maintain maximum flexibility for future arguments to the Tennessee authorities as to the precise effect of whatever ruling the Department of State might make. Specifically, counsel wanted to be in a position to argue that the Department of State decision, if favorable to Oak Ridge

⁵⁶ Leigh, *supra* note 37, at 280, 281, 285, 289.

and Roane County, was binding on the administrative and judicial bodies of the State of Tennessee, but that if unfavorable it was not binding.

It was recognized that one of the most potent positions assertable by the Tennessee taxing jurisdictions was that of waiver; the case was imbued with waiver from beginning to end. It was likewise recognized that Tennessee authorities, who would understandably be hesitant to venture into the exotic territory of sovereign immunity, a presumed preserve of the State Department, would be much more at home with the simple legal concepts of waiver, which arise in more ordinary litigation. Then, too, it was assumed that the Department of State, if it could be induced to be reluctant at all, could most plausibly be reticent in an area which clearly is the province of the states and does not fall within the refined expertise of the Department. The analysis was simple: If the Tennessee Board would rule first and would at least include in its ruling, presumably favorable to the Tennessee jurisdictions, a finding that the defense of sovereign immunity had been waived, the Department of State might find it appropriate to conclude that in light of this clear and authorized finding of waiver no purpose would be served by a ruling on whether or not the disputed transaction was otherwise immune. At the very least, the Department might be persuaded, were it nonetheless to proceed to a substantive finding of immunity, to make it clear that it was not purporting to rule on the question of waiver. Also, if the State of Tennessee decided adversely to the taxing jurisdictions but the Department of State decided in their favor, they would want to be in a position to assert, on the basis of *Republic of Mexico v. Hoffman*,⁵⁷ that the Department's decision was binding. It was felt that as a practical proposition the Department of State would be most protected with respect to both Japan and Tennessee if it reserved for Tennessee the decision on the question of waiver. The Department could take the position that it had done, or was willing to do, all it could, but that in this respect the matter was out of its hands. The Japanese would not be happy, but would be mollified, and the Tennesseans would be pleased. From the point of view of Tennessee this would be ideal, too, since the State of Tennessee, in supporting the decision of its local authorities, would be doing so on grounds admittedly within its competence and without treading on federal prerogatives.

For all these reasons, it was determined at the beginning to argue the question of waiver extensively before the Tennessee Board of Tax Equalization, but not before the Department of State. In so far as factual matters pertinent to the issue of waiver were advanced to the Department, they were couched in terms evidencing the commercial character of the transaction. Indeed, a most respectable case can be made that, while the Department of State may be completely determinative as to matters arising in federal courts, due to the constitutional allocation of powers among the three coordinate branches, the Department of State may not require a state

⁵⁷ 324 U.S. 30 (1945). In that case, the Supreme Court, speaking through Chief Justice Stone, stated: "It is therefore not for the counts to . . . allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 35.

tribunal to accede to its views on questions ordinarily reserved to state adjudication. Indeed, there is some authority to the effect that the Supreme Court itself, in *Ex Parte Peru*,⁵⁸ held "that the issue of waiver is to be determined by the courts despite an executive suggestion," and that that case "does not require deference when an issue of waiver arises."⁵⁹ Any constitutional authority of the federal government to determine such an issue is at an absolute minimum, if indeed it exists at all, where the question of waiver arises in conjunction with a *state* judicial or administrative proceeding; various state courts have declined to accept a State Department suggestion where they have found a waiver.⁶⁰ Occasional suggestions that the decision of the U.S. Court of Appeals for the Second Circuit in *Isbrandtsen Tankers, Inc. v. President of India*,⁶¹ held to the contrary are inaccurate. The tort cause of action for detention with respect to which sovereign immunity was suggested in that case clearly did not arise out of the contract which was the basis of another cause of action and with respect to which no immunity was claimed.⁶²

In any event, it is clear that the Department of State has refrained from addressing such issues. Former Legal Adviser John R. Stevenson stated in conjunction with a case involving South Vietnam:

In the present case the Department considers the question of whether immunity has been waived . . . to involve principally matters of contract interpretation, upon which it is inappropriate for the Department to express an opinion, and which the District Court is in the best position to determine.⁶³

In line with this view, the Foreign Sovereign Immunities Act of 1976 itself provides that immunity may be waived and that such a waiver is irrevocable (unless otherwise agreed by the parties).⁶⁴

The practical application of this strategy is seen in the varied handling of specific items before the two tribunals, the Tennessee Board of Tax Equalization and the Department of State. Before the Board it was argued

⁵⁸ 318 U.S. 578, 586 (1943).

⁵⁹ 11 COLUM. J. TRANSNATL. L. 334, 343-44 (1972).

⁶⁰ *United States of Mexico v. Schmuck*, 293 N.Y. 264, 56 N.E.2d 577 (1944); *Stephen v. Zivnostenska Banka Nafl Corp.*, 15 App. Div. 2d 111, 222 N.Y.S.2d 128 (1st Dep't. 1961), *aff'd*, 12 N.Y.2d 781, 186 N.E.2d 676, 235 N.Y.S.2d 1 (1962); *Republic of Cuba v. Arcade Building of Savannah, Inc.*, 104 Ga. App. 848, 123 S.E.2d 453 (1961); Note, *Statutory Reform in Claims Against Foreign States: The Belman-Lowenfeld Proposal*, 5 VAND. J. TRANSNATL. L. 393, 417 (1972); *see also* 13 HARV. INTL. L. J. 527, 532-33 (1972):

Should a court be willing to push [considerations of damage to international relations and embarrassment to the executive branch] aside if it is shown that the foreign sovereign agreed prior to suit that it would not rely on any defense available to it as a sovereign nation? . . . [T]he existence of the waiver might be thought to lessen the danger to foreign relations, inasmuch as the sovereign has indicated its consent to suit. Additionally, the private plaintiff may have bargained for inclusion of the waiver clause, and reasonably relied on its enforceability.

⁶¹ 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

⁶² *See* 13 HARV. INTL. L. J. 527, 533 (1972).

⁶³ Quoted at *id.*; *see also* Letter from John R. Stevenson, Legal Adviser, to Lakshmi Kant Jha., Ambassador of India, June 22, 1971, in 1971, A.M.C. 1834.

⁶⁴ Pub. L. 94-583.

that sovereign immunity was waived by international treaty; The Treaty of Friendship, Commerce and Navigation between the United States of America and Japan, signed April 2, 1953,⁶⁵ provided in Article XVIII(2) the standard lack of immunity of one government's agencies in the territory of the other as to liabilities to which "privately owned and controlled enterprises are subject therein." In the presentation to the Department of State, however, the treaty was characterized as constituting Japanese consent to application of the Tate Letter. The Board was urged further that because waiver was embodied in a treaty it had no discretion, since pursuant to our Constitution a treaty is part of the supreme law of the land.⁶⁶ The many contract provisions referred to above providing for arbitration, obligating the utilities to abide by all federal, state, and local rules and regulations, and stipulating U.S. federal internal law as the governing law, were cited to the Board as evidencing an implicit waiver.⁶⁷ The same facts were advanced to the Department of State as evidence of the commercial character of the transaction for consideration in application of the Tate Letter standard. The further arguments of waiver made in Tennessee, namely that there was no timely assertion of the defense by the government prior to a general appearance, as asserted in opposition to the motion of the Japanese Embassy to intervene in the Tennessee proceedings, and that consent to execution in resolving the Tennessee attachment proceedings necessarily implied consent to jurisdiction under the authority of *Flota Maritima Browning de Cuba v. Snobl*,⁶⁸ were merely referred to in historical footnotes in the brief submitted to the Department of State on behalf of the Tennessee taxing jurisdictions.

VI.

THE ARGUMENTS ON THE MERITS

Apart from the question of waiver, identical arguments were advanced in the two proceedings. The threshold issue was whether or not either tribunal had anything to decide. Technically speaking, the state assessment proceedings were matters within the jurisdiction of the territorial

⁶⁵ [1953] 4 UST 2063, TIAS No. 2863. ⁶⁶ U.S. CONST. Art. VI, Cl. 2.

⁶⁷ *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103, 107, 110 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966) (contractual submission to arbitration found sufficient to render sovereign amenable to suit and sufficient for denial of immunity); *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 361 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) ("[O]ne of the most significant indicators of the private commercial nature of this charter is the inclusion of the arbitration clause"); *Premier Steamship Co. v. Embassy of Algeria*, 336 F. Supp. 507 (S.D.N.Y. 1971) (grant of order appointing an arbitrator and directing that arbitration proceed in the manner provided for in the contract between the parties); *Pacific Molasses Co. v. Comite de Ventas de Miele*, 30 Misc. 2d 560, 219 N.Y.S.2d 1018, 1020 (Sup. Ct., N.Y. Co., 1961) (contractual consent to referral of any controversy to courts having jurisdiction under international law held to be a waiver of sovereign immunity); *cf. Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1199-200 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

⁶⁸ 363 F.2d 733, 737 (4th Cir.), *cert. denied*, 385 U.S. 837 (1966).

state *to prescribe*, as to which there is no immunity, and the only matter involving jurisdiction of the territorial state *to enforce*, i.e., the Oak Ridge and Roane County attachment proceedings, had already been compromised by the consent judgment in which the Japanese utilities agreed to execution if assessments, once upheld, should remain unpaid.⁶⁹

The further arguments were somewhat more mundane, all entailing consideration of various aspects in which the facts did or did not bring the case within the criteria of the Tate Letter. First of all, it was assumed that it would be virtually impossible for sovereign immunity status to be accorded a wholly private organization; while a governmental organization could of course be denied such status, if its character or the transaction in question were fundamentally commercial or private in nature, it seems unlikely that a private organization ever could be accorded immunity. The authorities in this area, however, are none too current or explicit.⁷⁰

The Japanese Government sought to imbue the private utilities with government character by pointing out that they were "authorized persons" under the intergovernmental cooperation agreement,⁷¹ citing correspondence in implementation of the utilities as such agents.⁷² Due to U.S. legislation, no international cooperation of the character here involved could be undertaken in the absence of such an agreement,⁷³ and, pursuant to such legislation, the United States has entered into similar agreements with twenty-two countries in addition to Japan.⁷⁴ The Tennesseans argued that

⁶⁹ See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§64, 65, Comment *d* (1965); Deák, *Immunities and Privileges of State Organs and of the State*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 473 (M. Sørensen, ed. 1968).

⁷⁰ *Oliver Am. Trading Co. v. Mexico*, 5 F.2d 659 (2d Cir. 1924), *cert. denied*, 267 U.S. 596 (1925); *In re Investigation of World Arrangements, etc.*, 13 F.R.D. 280 (D.D.C. 1952); *F. W. Stone Eng'r Co. v. Petroleos Americanos*, 352 Pa. 12, 42 A.2d 57 (1945); *United States of Mexico v. Schmuck*, 293 N.Y. 246, 56 N.E.2d 577 (1944); *Mason v. Intercolonial Ry. of Canada*, 197 Mass. 349, 83 N.E. 876 (1908); *Bradford v. Director Gen. of R.Rs. of Mexico*, 278 S.W. 251 (Tex. Civ. App. 1925); *Dunlap v. Banco Central del Ecuador*, 41 N.Y.S.2d 650 (Sup. Ct., N.Y. Co. 1943).

⁷¹ Cooperation Agreement, *supra* note 13, Art. VI.

⁷² Letter from Kenichi Murakami, Atomic Energy Attache, Embassy of Japan, to Samuel D. Tatalovich, Chief, Materials and Services Branch, Div. of Int'l Programs, AEC, March 12, 1973.

⁷³ See note 12 *supra*.

⁷⁴ Argentina (June 25, 1969, 20 UST 2587, TIAS No. 6721), Australia (June 22, 1956, 8 UST 738, TIAS No. 3830), Austria (July 11, 1969, 21 UST 10, TIAS No. 6815), Brazil (July 17, 1972, 23 UST 2477, TIAS No. 7439), Rep. of China (April 4, 1972, 23 UST 945, TIAS No. 7364), Colombia (April 9, 1962, 14 UST 388, TIAS No. 5330), Denmark (February 29, 1968, 19 UST 4669, TIAS No. 6459), Greece (August 4, 1955, 6 UST 2635, TIAS No. 3310), India (August 8, 1963, 14 UST 1484, TIAS No. 5446), Indonesia (June 8, 1960, 11 UST 2024, TIAS No. 4557), Iran (March 5, 1957, 10 UST 733, TIAS No. 4207), Israel (July 12, 1955, 6 UST 2641, TIAS No. 3311), Korea (November 24, 1972, 24 UST 775, TIAS No. 7583), The Philippines (June 13, 1968, 19 UST 3589, TIAS No. 6522), Portugal (May 16, 1974, 25 UST 1125, TIAS No. 7844), South Africa (July 8, 1957, 8 UST 1367, TIAS No. 3885), Spain (March 20, 1974, 25 UST 1063, TIAS No. 7841), Sweden (July 28, 1966, 17 UST 1176, TIAS No. 6076), Switzerland (December 30, 1965, 17 UST 1004, TIAS No. 6059), Turkey (June 10, 1955, 6 UST 2703, TIAS No. 3320), Venezuela

the fact that a transaction is undertaken within the framework of such an agreement does not immunize transactions in the private nuclear field any more than the existence of a bilateral P.L. 480 agreement can immunize a commodity purchase made within its framework.⁷⁵ The Tennessee taxing authorities argued that the presence of government regulation, even at the international level, does not automatically invest the transaction with immunity; otherwise, it was argued, every governmentally regulated airline, railroad, oil company, or other similar enterprise would claim immunity from taxation and legal process.

This argument was supported by textual analysis of the cooperation agreement itself, which distinguishes between a "Party," *i.e.*, one of the two governments, and "authorized persons under its jurisdiction," a "person" being defined to "not include the Parties to this Agreement."⁷⁶ The relationship is further clarified by reference to "the government of Japan or to any person acting on its behalf," a term literally distinct from "authorized person."⁷⁷ Indeed, the Tennessee authorities pointed out, the cooperation agreement expressly contemplates that various activities referred to therein, including arrangements for enrichment services, "shall be subject to . . . such contracting policies generally applicable to private transactions as the Parties may adopt."⁷⁸

The Tennessee taxing jurisdictions argued also that the utilities and the transaction in question, even were the utilities connected with the government, would not by virtue of their commercial and private character be immune. They argued that the transaction involved was substantially identical to any which might be undertaken by an American utility, such as Consolidated Edison, and would not normally be considered to partake of a sovereign character.⁷⁹ The Japanese Government relied heavily on *Isbrandtsen Tankers, Inc. v. President of India*,⁸⁰ an authority which the Tennesseans argued was inapposite, given the facts that the claim there immunized was a tort cause of action for detention of vessels, which called into question sovereign acts of internal administration, and that the Indian Government did not even seek a suggestion of immunity with respect to related claims arising out of a commodities sale agreement.⁸¹

Lastly, the Tennessee taxing jurisdictions argued that the very heavy Japanese reliance on the Nixon-Tanaka imprimatur was irrelevant. As indicated above, it was argued that the summit had not brought about the

(October 8, 1958, 11 UST 104, TIAS No. 4416), and Republic of Viet-Nam (April 22, 1959, 10 UST 1150, TIAS No. 4251).

⁷⁵ Cf. *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 361 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

⁷⁶ Cooperation Agreement, *supra* note 13, Arts. I(G), II(B).

⁷⁷ *Id.*, Art. VIII(F).

⁷⁸ *Id.*, Art. VI(C).

⁷⁹ See 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 465, 467 (1941); Bishop, *Immunity From Taxation of a Foreign State-Owned Property*, 45 AJIL 239, 258 (1952).

⁸⁰ 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

⁸¹ See Letter from John R. Stevenson, Legal Adviser, Department of State, to John F. Mitchell, Attorney General, Sept. 16, 1970, in 1971 A.M.C. 1833. See also 13 HARV. INT'L. L. J. 527, 528 (1972).

uranium purchases, that they would have been consummated in any event, and that it simply advanced their timing and resulted in the storage which caused the tax assessments. Recalling that the same announcements proclaiming the purchase of \$320 million of uranium enrichment services by "the Japanese power companies" had also proclaimed hundreds of millions of dollars worth of purchases of more prosaic goods such as agricultural, forestry, and fishery products, grain, civil aircraft and the like, it was urged that the logical projection of the Japanese theory would be to immunize any international commercial transaction made under the umbrella of bilateral trade promotion.

A parenthetical point was prompted by the inclusion in the Nixon-Tanaka deal of \$320 million (the same amount paid for enrichment services) of aircraft which, as noted above,⁸² involved the purchase by All Nippon Airways of Lockheed aircraft, which subsequently became the source of much international discussion and a crisis in the Japanese Government. The thought of widespread invocations of sovereign immunity in matters relating to the Lockheed affair doubtless operated to discourage the extension of sovereign immunity to the uranium transaction. Indeed, the Tennessee taxing jurisdictions pointed out that the Budget Committee of the Japanese Parliament had subpoenaed three American nationals to testify in a parliamentary investigation with regard to certain aspects of the Lockheed transaction, and apparently nobody had suggested they were immune from such process due to sovereign immunity arising out of the Nixon-Tanaka arrangements.⁸³

It was further argued for the Tennessee position that in any event, even assuming that the Japanese were correct as to the purpose of the Nixon-Tanaka uranium transaction, it is the *nature* of a transaction rather than its *purpose* which governs, according to applicable American jurisprudence, and the predominantly commercial nature of the enrichment deal seemed to preclude a finding of immunity.⁸⁴ The nature test was, of course, embraced in both versions of sovereign immunity legislation introduced in recent years by the Department of State.⁸⁵

It may be pertinent to note, if only for the sake of completeness, some miscellaneous points which were advanced to the Department of State by the Government of Japan. The memorandum filed with the Department

⁸² See note 4 *supra*.

⁸³ Memorandum on Behalf of the City of Oak Ridge and Roane County, Tennessee in Opposition to the Request of the Government of Japan for a Suggestion of Immunity, filed with the Department of State on March 1, 1976 at 52, n. 30 (hereinafter cited as Memorandum of Oak Ridge). See Washington Post, Feb. 27, 1976, at 14, col. 1, and N.Y. Times, Feb. 27, 1976, at 7, col. 1 (city ed.).

⁸⁴ ADM Milling Co. v. Bolivia, 14 ILM 1279 (1975) (D.D.C. 1975); Renchard v. Humphries & Harding Co., 381 F. Supp. 382, 385 n. 2 (D.D.C. 1974); Amkor Corp. v. Bank of Korea, 298 F. Supp. 143, 144 (S.D.N.Y. 1969); Ocean Transport Co. v. Ivory Coast, 269 F. Supp. 703 (E.D.La. 1967).

⁸⁵ H.R. 11315, 94th Cong., 1st Sess. §1603(d) (1975); H.R. 3493, 93d Cong., 1st Sess. §1603(b) (1973). This legislation, in slightly amended form, was recently signed into law. See note 1 *supra*.

hinted at "resulting political consequences" which might be feared from a decision adverse to the Japanese Government.⁸⁶ One authority, however, who subsequently became Legal Adviser, when presented at a symposium some years ago with the argument "that it is necessary for the State Department to intrude in certain cases where judicial action may embarrass the President in the conduct of foreign policy," rejected it unequivocally:

I agree with Professor Lillich that this is "one of the most overrated arguments in the annals of American legal history."⁸⁷

The Japanese also suggested that the selection of Oak Ridge as the site for storage was an arbitrary one made unilaterally by the United States, implying that the uranium could have been stored in other jurisdictions where there would be no taxation.⁸⁸ In response, the Tennessee authorities noted that in addition to Oak Ridge, only Paducah, Kentucky and Portsmouth, Ohio offer similarly secure governmental storage facilities⁸⁹ and such materials are apparently taxed in those states also.⁹⁰ It was argued further that, if the AEC was deficient in not advising the Japanese of their exposure to taxation in Tennessee, the utilities might well have concluded the same from their experience in being assessed for taxes elsewhere in the United States with respect to nuclear source material in the past,⁹¹ particularly since they had extensive experience themselves in paying national, prefectural, and municipal taxes in Japan.⁹² It was further argued by the Japanese that such taxation was inequitable, since the taxing jurisdictions did not provide "any service, protection or benefits" to the atomic energy facility at Oak Ridge,⁹³ an allegation which the Tennessee authorities sought to rebut with evidence of cooperative agreements for local fire departments and police support.⁹⁴ It was suggested by the Japanese that the tax imposed was one enacted after the Nixon-Tanaka agreement, impliedly for the purpose of reaching precisely these materials,⁹⁵ a suggestion which the taxing authorities denied.⁹⁶ The Japanese did not claim

⁸⁶ Memorandum of Japan, *supra* note 24, at 39.

⁸⁷ Leigh, *New Departures in the Law of Sovereign Immunity*, 63 ASIL PROC. 187, 192 (1969).

⁸⁸ Memorandum of Japan, *supra* note 24, at 43.

⁸⁹ AEC Press Release No. P-269 (Sept. 1, 1972).

⁹⁰ See KY. REV. STAT. ANN. §§131.190 *et seq.* (1969); OHIO REV. CODE ANN. §§5709.01 *et seq.* (1973). Likewise overstated were the Japanese complaints that the utilities had no "dominion" or "control" over the uranium stored at Oak Ridge. Memorandum of Japan, *supra* note 24, at 16, 36, 43. The utilities owned the uranium and under their contracts could have taken possession at any time they satisfied the terms of the contracts requiring replacement of feed material. As the Japanese Government itself admitted, the utilities subsequently conveyed title to the uranium. *Id.*, at 20.

⁹¹ Answers to Interrogatories, *supra* note 6, No. 52.

⁹² *Id.*, Nos. 44, 45, 47.

⁹³ Memorandum of Japan, *supra* note 24, at 43.

⁹⁴ Trial Record, *supra* note 16, at 13.

⁹⁵ Memorandum of Japan, *supra* note 24, at 45.

⁹⁶ The Constitution of Tennessee, Article II, Section 28, has provided for many years for such taxation. The only recent change was a reduction in the rate applicable to the uranium from 40% to 30% which became effective January 1, 1973.

that they were being taxed at an unlawful or prejudicial rate, *i.e.*, that the utilities were paying more tax per dollar of valuation on their property than other persons situate in the jurisdiction, such as IBM, Pitney-Bowes, and Xerox. The Tennessee authorities pointed out that in any event the total taxes assessed were less than two percent of the nearly \$1 billion worth of enrichment services performed for them over the years at Oak Ridge and with respect to which the Japanese were experiencing a profit on the Nixon-Tanaka deal exceeding \$200 million.⁹⁷

VII.

THE SETTLEMENT

As so frequently happens, the conclusion of a settlement deprived the parties of the satisfaction of an adjudicated disposition of their respective arguments. As indicated above, the case was first briefed and argued to the Tennessee Board of Tax Equalization by the taxing authorities and the Japanese utilities (with the Japanese Embassy appearing as *amicus*), and the Board took the matter under advisement. Thereafter briefs were submitted to the Department of State by the Tennesseans and the Japanese Embassy. Precisely 90 minutes before oral presentations were to be made by both sides to the Department, however, at which time the Tennessee Board of Tax Equalization had not yet rendered a decision, the matter was settled by the utilities and the taxing jurisdictions for a total of \$4.5 million. Thus no decision was ever rendered in either proceeding. As with all settlements, the mutual conclusion to compromise the matter arose out of a variety of considerations on both sides. Among other things, the cases raised a dozen or so constitutional, statutory, and factual issues, in addition to that of sovereign immunity, as to virtually each one of which the Tennessee tax authorities would have had to prevail in order to succeed. It should by now be apparent, however, that among the considerations on the Tennessee side was the knowledge that there was no guarantee of success in the State Department proceedings, and there would be no appeal from the Department's decision.

VIII.

CONCLUSION

When one sees the time and ingenuity devoted to the more political considerations which determined strategy and tactics in this case and the concern which, in part, gave rise to its settlement, one can only wish that the enactment of the Foreign Sovereign Immunities Act of 1976 would indeed have the intended effect of committing decisions in such matters exclusively to the courts. It is ironic, however, that this unique case would not have been encompassed by the Act, had it been in effect. The actual proceedings were largely administrative in nature, and the Act applies

⁹⁷ Memorandum of Oak Ridge, *supra* note 83, at 64-66.

only to "the courts of the United States and of the States."⁹⁸ In any event, the proceedings were mostly initiated by the Japanese themselves in order to obtain review of the assessments. The only court action against the utilities, namely the Chancery Court attachment suit, also could not have entailed application of the Act, since the utilities could not meet the statutory definition of a "foreign state" or its agency as required by the statute.⁹⁹ For the same reason, any other action to enforce an eventual tax judgment, if the assessments were upheld, would not have raised any questions under the Act.

Whether given these facts the Japanese would ever have approached the Department of State, were the Act in effect, and whether the Department, if approached, would ever have considered the issue presented, is impossible to know. Given the Department's announced intention no longer to issue suggestions of immunity,¹⁰⁰ it is doubtful that the Department would intervene in such a situation were it presented in the future, especially where the allegedly immune party is so clearly not a foreign government or an agency or instrumentality of such a government. If a similar case did arise in the future, however, involving a clearly governmental entity and administrative proceedings to which the Act does not apply, the course to be followed by the Department of State, if approached, is less clear. This case history thus reminds us that the Act leaves at least one important question unanswered. It may serve both as a spur to the prompt resolution of that question and as a guide to the handling of such cases pending that resolution.

ANNEX

The Honorable
Robert S. Ingersoll
Deputy Secretary
Department of State
201 C Street, N.W.
Washington, D.C. 20520

March 9, 1976

Dear Mr. Secretary:

This firm acts as special counsel for the City of Oak Ridge and Roane County, Tennessee, two local jurisdictions whose tax assessments with respect to uranium stored at Oak Ridge by ten private Japanese utilities have occasioned a request by the Government of Japan for a State Department "suggestion of immunity." The Japanese utility companies anticipate that such a ruling, if procured, would totally insulate them from the enforce-

⁹⁸ Pub. L. 94-583 §4(a).

⁹⁹ *Id.*

¹⁰⁰ See Department of State Public Notice No. 507, in which the Legal Adviser declares:

Future Department of State interests. The Department of State will not make any sovereign immunity determinations after the effective date of P.L. 94-583.

Indeed, it would be inconsistent with the legislative intent of that Act for the Executive Branch to file any suggestion of immunity on or after January 19, 1977. 41 Fed. Reg. 50, 883, 71 AJIL 343 (1977), 15 ILM 1437 (1976).

ment of tax liabilities totaling approximately \$16 million assessed against them for the years 1974 and 1975 by the taxing jurisdictions.

As of this writing, both the Government of Japan and the taxing jurisdictions have filed extensive briefs with the Office of the Legal Adviser, which will conduct a hearing according to its usual procedure on March 22, 1976. The Office of the Legal Adviser has noted in the past that decisions on requests for a suggestion of immunity may involve "appropriate consultation by the Office of the Legal Adviser with the other interested bureaus and officials in the Department." *Spacil v. Crowe*, 489 F.2d 614, 616 (5th Cir. 1974). I therefore assume it is possible that you, or, should you conclude that your involvement in this matter while Ambassador to Japan makes it inappropriate, another of the senior officials of the Department outside the Office of the Legal Adviser, may be consulted with respect to the decision the Department must render. I think it thus appropriate to emphasize to such senior officials the importance of the Department adhering, in its consideration of this matter, to the "restrictive theory" of sovereign immunity, pursuant to which immunity is denied application to commercial activities. As you noted in your letter to the President of the Senate last year endorsing draft legislation on the subject of sovereign immunity, "the 'restrictive theory' of sovereign immunity . . . has guided United States practice with regard to jurisdiction originally set forth in the letter of May 19, 1952 from the Acting Legal Adviser, Jack B. Tate, to the Acting Attorney General, Philip B. Perlman." That theory serves, as you said of the draft legislation, to "depoliticize litigation against foreign states. . . ."

Apart from the fact that it has been the policy of the Department for more than two decades, the restrictive theory has been expressly confirmed as the standard to be applied in this case: The Department has solemnly stated, in its Diplomatic Note of August 8, 1975 delivered to the Embassy of Japan, that "it follows the restrictive theory of sovereign immunity." It is pertinent to note that Japan itself fully accepted this standard over twenty years ago in its Treaty of Friendship, Commerce and Navigation with the United States of April 2, 1953 (T.I.A.S. No. 2863), Article XVIII, paragraph 2, when it agreed that

No enterprise of either Party, . . . shall, if it engages in . . . business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation . . . to which privately owned and controlled enterprises are subject therein.

Given Japanese acceptance of the restrictive theory, and the clearly expressed intention of the Department to apply it in the instant case, one perhaps should suffer no apprehension on this point. The Department of State has been criticized by knowledgeable observers in the past, however, for apparently failing in rare instances to adhere to the restrictive theory of immunity, deciding the occasional "hard case" instead on the basis of political considerations. See, e.g., Leigh, "Sovereign Immunity—The Case Of The 'Imias'", 68 *Am. J. Int'l L.* 280, 281, 285, 289 (1974). Cognizant of the dangers thus described, the citizens of the City of Oak Ridge and Roane County, Tennessee are genuinely concerned that the Department of State adhere, as it has consistently professed, to the legal standards established in the Tate letter.

In light of the overriding importance to the parties of the issues now pending before the Office of the Legal Adviser, the City of Oak Ridge and Roane County, Tennessee have thought it appropriate, through me, to bring

these considerations to your attention. I am sending a copy of this letter to counsel for the Embassy of Japan so that he may be fully aware of our communication and able, should he desire, to express a position with respect to it.

In closing, be assured of the respectful sentiments of the good citizens of the City of Oak Ridge and Roane County, Tennessee, who repose the utmost confidence in your fairmindedness and that of your colleagues.

Very truly yours,
CHARLES N. BROWER

Honorable Robert S. Ingersoll
Deputy Secretary
Department of State
2201 C Street, N.W.
Washington, D.C. 20520

March 11, 1976

Dear Mr. Secretary:

I am writing as counsel to the Embassy of Japan in connection with the Japanese Government's request—currently pending in the office of the State Department's Legal Adviser—for a suggestion of sovereign immunity with respect to the taxation of certain enriched uranium stored at Oak Ridge, Tennessee.

We have received a copy of the rather unusual letter regarding this matter which Mr. Charles N. Brower, counsel for the Tennessee taxing authorities, addressed to you on March 9, 1976.

We have no intention of attempting to circumvent the procedures established in the Legal Adviser's office by engaging Mr. Brower in an extraneous and indirect debate to you of the merits of the case.

One facet of his letter is so misleading, however, that we are compelled to correct it at this time. A review of the October 24, 1975 diplomatic note of the Embassy of Japan, and the supporting memorandum which has since been filed on behalf of the Embassy with the Legal Adviser, will demonstrate that the Japanese Government is not asking that the Department abandon precedent or depart from the restrictive theory to issue a suggestion of immunity in this case.

To the contrary, the Government of Japan is firmly convinced that a careful analysis of the transaction, which involved payment of \$320 million to the United States Treasury many years in advance of Japan's need for uranium enrichment services paid for pursuant to the government to government agreement, will clearly reveal, by any objective standard, the purest kind of sovereign governmental action. That is the position supported in the memorandum heretofore submitted on behalf of the Embassy of Japan. It will be supported further in a reply memorandum we expect to file on March 15 and in the conference we expect to attend in the Office of the Legal Adviser on March 22, 1976.

Cordially,
LINWOOD HOLTON

CEASE-FIRES, TRUCES, AND ARMISTICES IN THE PRACTICE OF THE UN SECURITY COUNCIL

By Sydney D. Bailey

There is no question that there has been confusion about the precise meaning of the terms cease-fire, truce, and armistice. The oldest term is *truce*, which in the Middle Ages usually had a religious connotation as in the phrase "Truce of God."¹ Hugo Grotius used *truce* to mean an agreement by which warlike acts are for a time abstained from, though the state of war continues—"a period of rest in war, not a peace."² If hostilities were resumed after a truce, according to Grotius, there would be no need for a new declaration of war, since the state of war was "not dead, but sleeping."³ Truces might be concluded by generals in command of forces or by officers of lower rank.⁴ In the absence of agreement to the contrary, it was lawful to rebuild walls or to recruit soldiers during a truce, but actual acts of war were forbidden, whether against persons or property: that is to say, "whatever is done by force against the enemy." Also forbidden were the bribery of enemy garrisons and the seizure of places held by the enemy.⁵ If a truce was violated, the injured party was free to resume hostilities "even without declaring war." Private acts did not constitute a violation, however, unless there was public command or approval.⁶

When the codification of international law began in the second half of the nineteenth century, a truce was the procedure by which belligerents entered into parleys, and an armistice was an actual agreement to suspend military operations. According to Articles 43-45 of the Brussels Declaration of August 27, 1874, a *parlementaire* was a person who had been authorized by one of the belligerents to enter into communication with the other side. He advanced bearing a white flag, accompanied by a bugler or drummer, sometimes also by a flag bearer. The enemy commander was not in all cases and under all conditions obliged to receive a *parlementaire* and was, in any case, entitled to take "all measures necessary for preventing the bearer of the flag of truce taking advantage of his stay within the radius of the enemy's position to the prejudice of the latter."⁷ The *parlementaire* and the accompanying party were inviolable unless

¹ 6(1) RECUEILS DE LA SOCIÉTÉ INTERNATIONALE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE (PROCS. OF THE SIXTH INTERNATIONAL CONGRESS HELD AT THE HAGUE, May 22-25, 1973) 141 (Belgian Report), 255-56 (French Report) (hereinafter cited as PROCS. OF HAGUE CONG.)

² Book III, Chapt. XXI, sects. I and II, 832, 834, THE LAW OF WAR AND PEACE (F. W. Kelsey trans. 1925) in 3 CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (CEIP), CLASSICS OF INTERNATIONAL LAW (reprinted 1964).

³ *Id.* sect. III, 834.

⁴ *Id.* Chapt. XXII, sect. VIII, 848.

⁵ *Id.* Chapt. XXI, sects. VI-VIII, 835-36. ⁶ *Id.* sects. XI and XIII, 838-39.

⁷ 1 AJIL Supp. 96, 102 (1907), 1 FRIEDMAN, THE LAW OF WAR: A DOCUMENTARY HISTORY 194, 201 (1972).

they abused their privileged position in order to provoke or commit an act of treason. If the parlementaire committed an abuse of confidence, the enemy commander had the right to detain him temporarily. These provisions became Articles 32-34 of the Regulations attached to the Hague Conventions of 1899 and 1907 under the heading "Flags of Truce," with the addition of a reference to an interpreter accompanying a parlementaire and an express provision that the obtaining of information during a truce was an abuse of confidence.⁸

An armistice, according to the Brussels Declaration, was a suspension of military operations by mutual agreement between the belligerents, either general in character and suspending all military operations everywhere, or local and applying only between "certain portions of the belligerent armies and within a fixed radius." Once an armistice had been concluded, it was to be notified promptly to the competent authorities and troops, and hostilities were to be suspended at once. An armistice was of undefined duration and the parties could resume military operations at any time, provided that the enemy was warned in advance within an agreed time limit. Violation of an armistice by one of the parties gave the other party the right to denounce it; violation by private persons acting on their own initiative entitled the injured party to demand the punishment of the offenders and, if necessary, compensation for the losses sustained. These provisions⁹ became Article 36-41 of the Hague Regulations of 1899 and 1907, with the addition of a statement that in case of urgency hostilities could be resumed at once to the article dealing with denunciation of an armistice after a serious violation.

By the end of the Second World War, there was a tendency to regard "truce" and "armistice" as synonymous, although "truce" was increasingly giving way to "armistice." "Les deux expressions ont d'ailleurs le même sens," wrote Rachelle Bernard in 1947.¹⁰ An armistice was a convention by which the belligerent parties agreed to a formal but temporary cessation of hostilities. It was normally negotiated directly by the two sides, but occasionally it arose from the initiative of a neutral state or the International Committee of the Red Cross.¹¹ It was a convention of a complex kind but military in its basic arrangements. Its main aim was not to resolve political or economic problems but to suspend hostilities for a time. It constituted an initial contact between the parties, often leading in due course to a peace treaty, but the legal state of war continued; an armistice was not peace.¹² Marcel Sibert, writing between the wars, considered

⁸ DOCUMENTS RELATING TO THE PROGRAM OF THE FIRST HAGUE PEACE CONFERENCE 38-39 (CEIP 1921); THE HAGUE CONVENTIONS OF 1899 (II) and 1907 (IV) RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND 20-23 (CEIP 1915).

⁹ Arts. 48-52.

¹⁰ Bernard, *L'armistice dans les guerres internationales* 7 (doctoral thesis No. 454, Faculty of Law, University of Geneva, 1947).

¹¹ Sibert, *L'armistice dans le droit des gens*, 40 REV. GEN. DE DROIT INT. PUBLIC 666 (1933); Bernard, *supra* note 10, at 8; Bliss, *The Armistices*, 16 AJIL 520 (1922).

¹² Sibert, *supra* note 11, at 657, 658, 662, 663, 700; Bernard, *supra* note 10, at 7-8, 12, 14, 18, 19, 24, 25, 26, 67; STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICTS: A LEGAL TREATISE ON THE DYNAMICS OF DISPUTES AND WAR-LAW* 636 (1954).

that while in former times an armistice had been simply an agreement between belligerents to suspend hostilities in order to prepare for peace in more favorable conditions than was possible in time of war, the armistice was becoming a means by which the surrender of the enemy was secured, often including conditions for permanent peace. This, in Sibert's view, was a completely new concept.¹³

There was no clear agreement about acts to be permitted or forbidden during an armistice. A demarcation line would be established and possibly also a neutral zone. Each party remained behind the demarcation line, and there was to be no firing or movement across the line by military forces or civilians, although troop movements behind the lines were permitted. But beyond these agreed restrictions, there was only uncertainty, about the supply of food to places under siege, for example.¹⁴

Violations were deterred by preventive or enforcement measures, but the ultimate sanction against a substantial and deliberate breach was the threat to resume hostilities. Minor violations of a particular provision of the armistice, committed in good faith, or actions by private persons without the knowledge of the responsible authorities, were not deemed to justify denunciation. A distinction had to be made between the seriousness of the offense and the urgency of the response.¹⁵

UN PRACTICE

The creation of the United Nations, with its Security Council having the "primary responsibility for the maintenance of international peace and security," initiated a new era. The blurring of the distinction between truce and armistice was halted. A truce was a consequence of the intervention of an intermediary, usually a subsidiary organ of the Security Council, whereas an armistice resulted from negotiations between the parties. Moreover, a new concept was introduced, the call to cease-fire or cease-hostilities. This was an emergency appeal by the Security Council, usually accompanied or quickly followed by a request to a subsidiary organ to try to organize a more durable arrangement. There also arose a tendency to see the terms cease-fire, truce, and armistice as representing a sequence, "three stages of progress from war to peace"¹⁶ "a first link in a chain running from war to peace."¹⁷

The first occasion on which the Security Council acted to put an end to fighting was on August 1, 1947, following the first Dutch "police action" in Indonesia. The Council called on the armed forces of the Netherlands

¹³ Sibert, *supra* note 11, at 714.

¹⁴ *Id.* 681, 685, Bernard, *supra* note 10, at 68, 69, 71-74, 85.

¹⁵ Sibert, *supra* note 12, at 709, 712; Bernard, *supra* note 11, at 114-16.

¹⁶ Mohn, *Problems of Truce Supervision*, INTERNATIONAL CONCILIATION, No. 478, at 53 (1952).

¹⁷ Bastid, PROCS. OF HAGUE CONG., *supra* note 1, at 41; *id.* 152 (French Report). See also Report of the Interim Committee, 4 GAOR Supp. (No. 11) 25, paras. 141-43, UN Doc. A/966 (1949) and GOODRICH & SIMONS, THE UNITED NATIONS AND THE MAINTENANCE OF PEACE AND SECURITY 377 (1955).

and the Republic of Indonesia to "cease hostilities forthwith."¹⁸ A prolonged wrangle then ensued between the parties as to the precise meaning of the Security Council's resolution.

The members of the Security Council had not of course been engaged in writing a textbook on international law. They were eleven states responding to a dangerous situation, but with the usual clashes of ideology and interest. The initiative for convening the Council had been taken by Australia and India. Australia submitted a proposal which *inter alia* would have determined that the hostilities constituted a breach of the peace under Article 39 of Chapter VII of the Charter. The United States wanted to tone down the Australian draft so as to avoid any reference to Chapter VII; the Soviet Union would have liked to strengthen the Australian proposal by adding a call for the withdrawal of forces to the positions held before the fighting had begun, while France thought that the resolution should state expressly that the Council had taken no decision on its own competence in the matter. The Council accepted the U.S. amendment, rejected those of the Soviet Union and France, and then adopted the remaining paragraphs. The three West European members (Belgium, France, and United Kingdom) abstained on all parts, and the Soviet Union (but not Poland) abstained also on the part expressing "concern" about the outbreak of hostilities, preferring more vigorous language.¹⁹

The Netherlands, although not a member of the Security Council, had participated in its deliberations and was cognizant of its decision. The Indonesian Republic was not at that time represented in New York, and it was therefore necessary for Secretary-General Trygve Lie to communicate the text of the resolution to the Indonesian authorities by cable, a problem complicated by the fact that many of the Indonesian nationalist leaders had been detained by the Netherlands authorities two weeks earlier. The UN Secretariat, with the best of intentions, transmitted the text of the resolution to the Indonesians via the Dutch authorities in Djakarta (Batavia). At 14.00 hours on August 3, Dr. A. K. Gani, Deputy Prime Minister and Minister of Economic Affairs in the Indonesian Republic, was released from detention and at 19.30 hours the same day, H. J. van Mook, the Dutch Lieutenant Governor-General in Indonesia, sought to hand to Gani the text of the Security Council's resolution. Gani refused to accept responsibility for transmitting the cable to the Indonesian leaders in Jogjakarta, so at 00.30 hours on August 4, the Netherlands authorities broadcast the text over the Djakarta radio, and later dropped a copy by parachute over Jogjakarta airfield.²⁰ This problem of communicating Security Council resolutions to the parties was to recur in other conflicts.²¹

¹⁸ SC res. 27, 2 SCOR, RES. & DEC. 6, UN Doc. S/459 (1947).

¹⁹ 2 SCOR (173rd mtg.) 1700-10 (1947).

²⁰ *Id.* (174th mtg.) 1716-18, UN Doc. S/465; *id.* (178th mtg.) 1841-42, 1850-51, UN Doc. S/469. See also Report of the Consular Commission, *id.*, Spec. Supp. (No. 4) 72, UN Doc. S/586/Rev. 1.

²¹ For communication delays during the first Palestine war, see 3 SCOR (299th mtg.) 4; *id.* (303rd mtg.) 37, 38, 40 (1948).

In addition to the delay in the receipt of the Security Council's resolution by one of the parties to the conflict, the Dutch and the Indonesians interpreted the resolution of the Security Council differently—indeed, it was in their interests to do so. The Netherlands had been pursuing spearhead tactics by advancing along the main lines of communication and seizing strategic points. When the Security Council called for a cessation of hostilities, the Netherlands drew imaginary lines on a map linking their forward positions and regarded these as the *de facto* lines separating the forces of the two sides. The Indonesians, by contrast, had been using guerrilla tactics and thus found many of their active units beleaguered behind the arbitrary Dutch lines.

Both parties accepted that the Security Council's call meant that firing had to stop, but the Netherlands took the view that it also meant an end to all military operations, while the Indonesians thought that the only other requirement was to stand fast.²² The very existence of the by-passed Indonesian forces was regarded by the Netherlands as a breach of the call to cease hostilities.²³ On August 29, van Mook issued a unilateral declaration establishing new demarcation lines.²⁴ The Security Council itself added to the linguistic confusion by calling in its first resolution for a cessation of hostilities and then, in three subsequent resolutions, by referring to the initial decision as a call to cease fire,²⁵ which has a similar but not identical meaning.

The next attempt by the Security Council to end fighting was during the Palestine war of 1948, when the Council used various terms in calling for a cessation of military action but referred to the subsequent periods of relative military inactivity as truces.²⁶ After 1948, the Council usually used the expression "cease fire" or "cease hostilities" for the initial appeal, reserving the word "truce" for the subsequent step, usually arranged by a subsidiary organ. This was its practice regarding the second Netherlands "police action" in Indonesia,²⁷ Korea,²⁸ Cyprus (1964 and 1974),²⁹ the

²² Report of the Consular Commission, *supra* note 20, at 71-72, 90-91; 2 SCOR (211th mtg.) 2570, UN Doc. S/581, para. 2 (1947).

²³ *Id.* para. 3.

²⁴ Report of the Consular Commission, *supra* note 20, at 130-33.

²⁵ SC res. 27, *supra* note 18; SC res. 30, 2 SCOR, RES. & DEC. 6, UN Doc. S/525, I (1947); SC res. 32, *id.* 7, UN Doc. S/525, III; SC res. 36, *id.* 9, UN Doc. S/597.

²⁶ SC res. 43, 3 SCOR, RES. & DEC. 14, UN Doc. S/714, I (1948); SC res. 46 *id.* 15, UN Doc. S/723; SC res. 48 *id.* 17, UN Doc. S/727; SC res. 49 *id.* 19, UN Doc. S/773; SC res. 50 *id.* 20, UN Doc. S/801; SC res. 53 *id.* 21, UN Doc. S/875; SC res. 54 *id.* 22, UN Doc. S/902; SC res. 56 *id.* 24, UN Doc. S/983; SC res. 59 *id.* 26, UN Doc. S/1045; SC res. 66 *id.* 30, UN Doc. S/1169.

²⁷ SC res. 63, 3 SCOR, RES. & DEC. 12, UN Doc. S/1150 (1948).

²⁸ SC res. 82, 5 SCOR, RES. & DEC. 4, UN Doc. S/1501 (1950); SC res. 83 *id.* 5, UN Doc. S/1511.

²⁹ SC res. 193, 19 SCOR, RES. & DEC. 6, UN Doc. S/5868 (1964); *id.* (1143rd mtg.) para. 358; SC res. 353, 29 SCOR, RES. & DEC. 7, UN Doc. S/11350 (1974); SC res. 354, *id.*, UN Doc. S/11369; SC res. 355, *id.* 8, UN Doc. S/11402; SC res. 357, *id.*, UN Doc. S/11446/Rev. 1; SC res. 358, *id.*, UN Doc. S/11448.

Dominican Republic (1965),³⁰ the India-Pakistan war of 1965,³¹ the June war in the Middle East (1967),³² and the October war in the Middle East (1973).³³ Sometimes the Council added an injunction to desist from or to discontinue or to terminate or to cease all military activities: this was done in connection with the India-Pakistan war of 1965,³⁴ the June war in the Middle East,³⁵ the October war in the Middle East,³⁶ and Cyprus (1974).³⁷ In the Palestine war of 1948, the Council used a variety of formulations in addition to a straightforward call to cease fire—a cessation of all acts of violence (April 1); a cessation of all military or paramilitary activities “as well as acts of violence, terrorism and sabotage” (April 17); abstention from hostile military action (May 22); cessation of all acts of armed force (May 29); and desisting from further military action (July 15).³⁸ In the case of the second Dutch “police action” in Indonesia, the Security Council called for the discontinuance of all military operations and for the cessation of guerrilla warfare.³⁹ A lengthy resolution on the Congo in 1961 called on “the United Nations” to take appropriate measures to prevent civil war, “including arrangements for cease-fires,” and in one resolution on the Dominican Republic in 1965, the Council asked that “the suspension of hostilities . . . be transformed into a permanent cease-fire.”⁴⁰

The Security Council can also add legitimacy to a cease-fire agreement negotiated outside its auspices, as happened after the Bangladesh war,⁴¹ and after the Brezhnev-Kissinger agreement during the October war in the Middle East.⁴²

In a number of cases, the Council has called for a return to the positions held on a specified date, although rarely with much success—after the first Dutch “police action” in Indonesia,⁴³ following the offensive by Israel in October 1948,⁴⁴ after the French attack on Bizerta (Tunisia) in 1961,⁴⁵

³⁰ SC res. 203, 20 SCOR, RES. & DEC. 10, UN Doc. S/6355 (1965); SC res. 205, *id.*, UN Doc. S/6376; and *id.* (1233rd mtg.) para. 2.

³¹ SC res. 209, 20 SCOR, RES. & DEC. 13, UN Doc. S/6657 (1965); SC res. 210, *id.* 14, UN Doc. S/6662; SC res. 211, *id.* UN Doc. S/6694; SC res. 214, *id.* 16; SC res. 215, *id.* 16, UN Doc. S/6876; and *id.* (1244th mtg.), para. 50.

³² SC res. 233, 22 SCOR, RES. & DEC. 2, UN Doc. S/7935 (1967); SC res. 234, *id.* 3, UN Doc. S/7940; SC res. 235, *id.* 4, UN Doc. S/7960; SC res. 236, *id.* 4; SC res. 240, *id.* 7.

³³ SC res. 338, 28 SCOR, RES. & DEC. 10, UN Doc. S/11036 (1973); SC res. 339, *id.* 11, UN Doc. S/11039; SC res. 340, *id.*, UN Doc. S/11046/Rev. 1.

³⁴ SC res. 215, *supra* note 31.

³⁵ SC res. 233, 234, 235, 236, *supra* note 32.

³⁶ SC res. 338, 339, *supra* note 33.

³⁷ SC res. 357, *supra* note 29.

³⁸ SC res. 43, 46, 49, 50, 54, *supra* note 26.

³⁹ SC res. 67, 4 SCOR, RES. & DEC. 2, UN Doc. S/1234 (1949).

⁴⁰ SC res. 205, *supra* note 30.

⁴¹ SC res. 307, 26 SCOR, RES. & DEC. 11, UN Doc. S/10465 (1971), noted India's unilateral declaration of a cease-fire in the western theatre and Pakistan's agreement to it, noted also that “consequently a cease-fire and a cessation of hostilities prevail,” and demanded that “a durable cease-fire and cessation of all hostilities in all areas . . . be strictly observed. . . .”

⁴² SC res. 338, *supra* note 33.

⁴³ SC res. 36, *supra* note 25.

⁴⁴ 3 SCOR (367th mtg.) 38 (1949); SC res. 61 *id.* RES. & DEC. 28, UN Doc. S/1070; SC res. 62, *id.* 29, UN Doc. S/1080.

⁴⁵ SC res. 164, 16 SCOR, RES. & DEC. 9, UN Doc. S/4882 (1961).

during the India-Pakistan war of 1965,⁴⁶ during the June and October wars in the Middle East,⁴⁷ and after the Bangladesh war.⁴⁸

THE SEMANTIC CONFUSION

A number of writers have commented on the linguistic confusion in the practice of the United Nations. Paul Mohn notes that different terms were applied to the same situation and that the same term was used with different meanings,⁴⁹ and Vladimir Dedijer comments on the inconsistent terminology in UN practice.⁵⁰ Shabtai Rosenne writes of the lack of discrimination and precision in the use of terms and considers that truce and armistice are virtually indistinguishable, a view also put forward by Alf Monsen, the Norwegian Judge Advocate General.⁵¹ Stone writes that the term truce has "undergone some transformation in United Nations practice."⁵² Bowett finds the distinctions between cease-fire, truce, and armistice "not entirely clear." He writes that the Security Council has tended to use cease-fire and truce interchangeably, though there is "something to be said" for the view that a truce, as opposed to a cease-fire, is "normally more than a simple cessation of hostilities and incorporates a complex of mutual undertakings and conditions."⁵³ It will be noted that these distinguished writers do not agree with each other.

When the International Society for Military Law and Law of War met in the Hague in 1973, almost every participant, including Professor Suzanne Bastid (the general rapporteur), the national reports from Belgium, Britain, France, and the United States, and Colonel G. I. A. D. Draper commented on the semantic problem.⁵⁴ Major Fred K. Green, author of the U.S. report, thought that the term cease-fire "may eventually supplant the term armistice. . . ." ⁵⁵

Some of the confusion about the use of terms can be illustrated by an article on the nature and scope of the armistice agreement by Colonel (now Professor) Howard S. Levie, which was published in this *Journal* in 1956.⁵⁶ Levie had studied the "somewhat esoteric documents," in the Library of the International Court of Justice in The Hague and had paid particular attention to "no less than ten major general armistice agree-

⁴⁶ SC res. 209, 210, 211, 215, *supra* note 31.

⁴⁷ SC res. 236, *supra* note 32 and SC res. 339, 340, *supra* note 33.

⁴⁸ SC res. 307, *supra* note 41.

⁴⁹ Mohn, *supra* note 16, at 52.

⁵⁰ DEDIJER, ON MILITARY CONVENTIONS: AN ESSAY ON THE EVOLUTION OF INTERNATIONAL LAW 123 (1961).

⁵¹ ROSENNE, ISRAEL'S ARMISTICE AGREEMENTS WITH THE ARAB STATES: A JUDICIAL INTERPRETATION 24-25 (1951); PROCS. OF HAGUE CONG., *supra* note 1, at 356.

⁵² STONE, *supra* note 12, at 645.

⁵³ BOWETT *et al.*, UNITED NATIONS FORCES: A LEGAL STUDY OF UNITED NATIONS PRACTICE 73-74 (1964).

⁵⁴ PROC. OF HAGUE CONG., *supra* note 1, at 31 (Bastid), 143 (Belgian Report), 198-200 (U.S. Report), 253 (French Report), 365 (British Report), 375 (Draper).

⁵⁵ *Id.* 200 (US Report).

⁵⁶ Levie, *The Nature and Scope of the Armistice Agreement*, 50 AJIL 880-906 (1956).

ments" which had been concluded since the Second World War.⁵⁷ Levie regarded the terms cease-fire, truce, and armistice as synonymous, since one of his ten was a cease-fire (Kashmir), one was a truce (the agreement between the Netherlands and Indonesia of January 17, 1948), while the remaining eight were armistice agreements proper (the four between Israel and the Arab States in 1949, the Korean armistice in 1953, and the three armistices in Indo-China in 1954). Levie, no doubt for good reasons, does not refer to the cease-fires or truces sponsored by the Security Council in Palestine in 1948; the bilateral cease-fire agreements between Israel and Egypt, Israel and Jordan, and Israel and Syria in 1948 and 1949, which preceded the general armistice agreements; or the agreement between the Netherlands and Indonesia of August 1, 1949, following the second Dutch "police action." Moreover, Levie seems not to have carried his investigations into the Kashmir case far enough. The document which he cites (S/995)⁵⁸ was not an agreement between the parties but a resolution of the UN Commission for India and Pakistan (UNCIP).⁵⁹ The cease-fire part of UNCIP's resolution was formally accepted by India and Pakistan in January 1949,⁶⁰ but the truce part of the resolution never entered into force. Levie explains the absence of arrangements for demarcating the line separating the forces of the two sides as due to the fact that Pakistan had agreed to withdraw its forces from Jammu and Kashmir,⁶¹ but the cease-fire line was, in fact, demarcated and agreed by military representatives of the parties at a meeting in Karachi on July 27, 1949.⁶² Levie writes that neither UNCIP nor the parties raised the question of prisoners of war,⁶³ but that question was dealt with in the truce agreement between the Commanders-in-Chief of India and Pakistan of January 15, 1949, which the parties never ratified, as well as in UNCIP's own detailed truce proposals.⁶⁴ In addition, UNCIP made representations to India when Pakistan complained that certain prisoners in Kashmir had been given harsh sentences by the Maharajah's Government, although India objected that the matter could not be dealt with until a truce agreement had been formally signed and the Plebiscite Administrator had been appointed.⁶⁵

Other scholars and practitioners have unwittingly caused confusion by using terms loosely or inconsistently. The U.S. Army Field Manual starts its definition of armistice with the words: "An armistice (or truce as it is

⁵⁷ *Id.* 880 and n. 65.

⁵⁸ *Id.* n. 5. The date of the cease-fire resolution was August 13, 1948, not September 13, as given by Levie.

⁵⁹ 3 SCOR, Supp. (Nov. 1948) 32-34, UN Doc. S/1100, para. 75.

⁶⁰ 4 SCOR, Spec. Supp. (No. 7) 169-72, UN Doc. S/1430, Annex 47 (1949).

⁶¹ Levie, *supra* note 56, at 894-95.

⁶² 4 SCOR, Spec. Supp. (No. 7), *supra* note 60, at 126-29, Annex 26.

⁶³ Levie, *supra* note 56, at 899.

⁶⁴ 4 SCOR, Spec. Supp. (No. 7), *supra* note 60, at 105, 110-11, 112, 171-72, 182 (Section E.3 to the Appendix to Annex 17, para. 10 of Annex 20, Section III.D of Annex 21, Section B.5 of Annex 47, and para. 16 of Annex 47).

⁶⁵ *Id.* 64-65 (Appendix II).

sometimes called). . . ."⁶⁶ The author of the official U.S. history of the armistice negotiations in Korea writes that for literary reasons, "the terms 'armistice,' 'truce,' and 'cease-fire' have been used interchangeably," a practice also followed by General Mark Clark.⁶⁷

There has been a tendency to blame the UN Security Council for the semantic muddle, and this was for a time justified, but only during a short period in 1948-49, and then only regarding Palestine and the second phase in Indonesia. On all other occasions, the Security Council and its subsidiary organs have used a consistent terminology. As noted above, part of the confusion seems to have arisen because in the Palestine case in 1948, the resolutions of the Security Council calling for an end to the fighting used phrases like cease-fire, but when the resolutions of the Council took effect, the period of "no fighting" was known as a truce.

THE ROLE OF THE SECURITY COUNCIL

The Security Council sees its task as to call for a halt to the fighting, leading the parties to issue cease-fire orders to their forces. A subsidiary organ in the field then negotiates with the parties a truce of a more detailed and durable kind. A cease-fire is simply a suspension of acts of violence by military and paramilitary forces, resulting from the intervention of a third party. It is a preliminary and provisional step, providing a breathing space for the negotiation of more lasting agreements.⁶⁸

By looking at the Indonesian (first phase) and Kashmir cases (1948-49) we can discern what the Security Council, its subsidiary organs, and the parties considered was involved in a cease-fire and what was or would have been involved in a truce. The crucial documents are the truce agreement between the Netherlands and the Indonesian Republic signed on board the USS *Renville* on January 17, 1948, and the resolution on Kashmir adopted by the Commission for India and Pakistan (UNCIP) on August 13, 1948 which envisaged that the parties would issue separate cease-fire orders and also set forth the principles of an eventual truce agreement. The Commanders-in-Chief of India and Pakistan agreed in January 1949 that "the cease-fire [in Kashmir] . . . should be advanced from an informal to a formal basis," and an agreement on the delineation of the cease-fire line was reached six months later. Agreement between the parties on a truce was never reached, however, though one may speculate as to what it might have contained by referring to the unratified truce agreement between the two Commanders-in-Chief in January 1949, as well as to UNCIP's own truce proposals of April 15 and 28, 1949, which the parties rejected.⁶⁹

⁶⁶ THE LAW OF LAND WARFARE, FM27-10, para. 479 (1956).

⁶⁷ 2 HERMES, UNITED STATE ARMY IN THE KOREAN WAR: TRUCE TENT AND FIGHTING FRONT 13, n. 1 (1966); CLARK, FROM THE DANUBE TO THE YALU (1954).

⁶⁸ ROSENNE, *supra* note 51, at 25; Mohn, *supra* note 16, at 57; PROCS. OF HAGUE CONG., *supra* note 1, at 35 and 36 (Bastid), 152 (Belgian Report), 257 (French Report), 355 (Norwegian Report).

⁶⁹ 3 SCOR, Spec. Supp. (No. 1) 68-69, 72-75, 77, UN Doc. S/649/Rev. 1, Ap-

A Cease-fire included:

- (1) Issuance by the parties of cease-fire orders to all forces under their control;
- (2) Parties free to adjust their defensive positions behind the cease-fire lines, but no augmentation of military forces to be allowed nor the introduction of additional military potential;
- (3) Parties to confer regarding local changes in the disposition of military forces, with a view to avoiding incidents and facilitating the cease-fire;
- (4) Demarcation of de facto lines separating the forces of the two sides, and possibly also demilitarized zones;
- (5) Military observers responsible to the Security Council or a subsidiary organ to supervise the observance of the cease-fire.

A Truce included:

- (1). Progressive thinning out or withdrawal of regular and irregular forces (Kashmir): gradual reduction of the armed forces of both parties, withdrawal of forces from demilitarized zones, and evacuation of by-passed military units (Indonesia);
- (2) Arrangements for the administration of areas from which military forces would withdraw and provision of military and civil forces to assist in maintaining law and order (Kashmir): civil police (including temporary use of military personnel under civilian control) to maintain law and order in the demilitarized zones, and cooperation between the police forces of the two sides (Indonesia);
- (3) Roads and waterways to be open for the movement of refugees and all other nonmilitary personnel (Kashmir): restoration of conditions for normal transportation, communications, and trade (Indonesia);
- (4) Release of prisoners of war and political prisoners, and the return of abducted women (Kashmir): mutual release of prisoners without regard to the numbers held (Indonesia);
- (5) Measures to be taken for guaranteeing human and political rights, including the repeal of emergency legislation (Kashmir): general political amnesty, guarantees of free expression of opinion and other basic rights, and prohibition of intimidation and reprisals (Indonesia).

A cease-fire was thus a necessary element in a truce: it could be a prelude to a truce (as envisaged for Kashmir) or the two stages could be conflated (as in Indonesia).

But what, in the practice of the Security Council, has been the differ-

pendices IX, XI, and XIV (1948); *id.*, Supp. (Nov. 1948), *supra* note 59, at 32-34 (para. 75); 4 SCOR, Supp. (Jan. 1949) 23-25, UN Doc. S/1196, para. 15; *id.*, Spec. Supp. (No. 7), *supra* note 60, at 102-05, 111-13, 126-29, 169-72, Annexes 17, 21, 26, and 47.

ence between a truce and a general armistice? The cases on which one can base an answer are the armistice agreements between Israel and its four Arab neighbors in 1949⁷⁰ and the armistice agreement between the Unified Command in Korea, as one party, and North Korea and China, as the other, in 1953.⁷¹

The truce in Indonesia in 1948 and the proposed truces in Kashmir in 1948 and 1949 arose from initiatives of subsidiary organs of the Security Council (the Good Offices Committee in the Indonesian case and the UN Commission for India and Pakistan in Kashmir), whereas the five armistice agreements resulted from direct negotiations between the parties. In the practice of the Security Council an armistice is distinguished from a cease-fire or truce by the fact that it is an agreement negotiated directly between the belligerents. A third party may assist the two sides to agree on terms of an armistice, as did Ralph Bunche in the Middle East in 1949; negotiations may continue over months or, as in the Korean case, years before agreement is reached. But the agreement is between the parties; an armistice has never been imposed by the Security Council. An armistice "defines a situation which the various parties brought about by their own agreement . . ." (Rosenne),⁷² and is "a consensual contract reached by mutual agreement . . ." (Dedijer).⁷³ In the absence of agreement to the contrary, an armistice is of unlimited duration.⁷⁴

Second, armistice agreements have concerned only military matters. It was widely assumed in the Middle East in 1949, although possibly not by all the Arabs, and it was explicitly laid down in the Korean armistice in 1953, that political negotiations were to follow; and all five armistice agreements were expressly declared to be dictated only by military considerations.⁷⁵ Responsibility for political negotiations in the Middle East had been laid on the UN Palestine Conciliation Commission, which had been established by the General Assembly on December 11, 1948,⁷⁶ one of the functions of which was to promote "a peaceful adjustment of the future situation of Palestine."⁷⁷ In the Korean case, negotiations on substantive issues were to be dealt with at "a political conference of a higher level. . . ." ⁷⁸

Third, all five armistice agreements provided for the creation of armistice commissions, composed of an equal number of representatives of the two

⁷⁰4 SCOR, Spec. Supp. (No. 1) Israel-Jordan, UN Doc. S/1302/Rev. 1 (1949); *id.* Spec. Supp. (No. 2) Israel-Syria, UN Doc. 1353/Rev. 1; *id.* Spec. Supp. (No. 3) Israel-Egypt, UN Doc. 1264/Rev. 1; *id.* Spec. Supp. (No. 4) Israel-Lebanon, UN Doc. S/1296.

⁷¹8 SCOR, Supp. (July-Sept. 1953), UN Docs. S/3079, Appendices A and B, and S/3084.

⁷²ROSENNE, *supra* note 51, at 30.

⁷³DEDIJER, *supra* note 50, at 67.

⁷⁴ROSENNE, *supra* note 51, at 28, 82; Levie, *supra* note 56, at 881, 892.

⁷⁵Article IV of the Israel-Egypt armistice agreement, Article II of the Israel-Jordan, Israel-Lebanon, and Israel-Syria agreements (*supra* note 70) and preamble to the Korean armistice agreement (*supra* note 71).

⁷⁶G.A. res. 194 (III).

⁷⁷G.A. res. 186 (S-2).

⁷⁸Para. 60 of the Korean armistice agreement, *supra* note 71.

sides, to supervise the implementation of the agreements and to settle complaints of violations.⁷⁹

One cannot assert unconditionally that none of these elements would have been present if a truce in Kashmir had been agreed in 1948 or 1949. The evidence is not quite conclusive. What one can certainly affirm, however, is that just as truces have usually been more complex than simple cease-fires, so the five armistice agreements were more elaborate than any of the Security Council truces, no doubt because they were thought of as more long term in nature.

Several writers, with the Middle East armistice agreements primarily in mind, see an armistice as implying a positive commitment to or formal acceptance of an eventual peaceful settlement (Mohn),⁸⁰ a step towards the termination of war (Stone),⁸¹ a preliminary step to a peace treaty (Dedijer),⁸² a milestone on the way to a peace treaty (Bastid);⁸³ but there is no dissent from the conclusion that an armistice is not peace and does not end the legal state of war.⁸⁴

There has, of course, been significant experience since the Second World War outside the auspices of the Security Council, particularly the three Geneva agreements on Indo-China in 1954 and the Paris accords on Vietnam in 1973. But the practice of the Security Council has coincided with the advice of the so-called Little Assembly (Interim Committee) in July 1949—that the Security Council issues the first appeal or, acting under Chapter VII, makes an order for the cessation of fighting; that subsidiary organs of the Security Council initiate truce arrangements; and that the parties themselves negotiate the armistice.⁸⁵ This was the tenor of Ralph Bunche's report to the Security Council on July 21, 1949 regarding the four armistice agreements on the Middle East. The mandatory truce of July 15, 1948, was of indefinite duration and included a permanent injunction against resort to force, but it seemed to Bunche unnecessary to impose on the parties all of the "burdensome restrictions" of the second truce. The truce was now obsolete and had been superseded by effective armistice agreements voluntarily negotiated by the parties. The Security Council might now reaffirm its order to desist from military action and call on the parties to continue an unconditional cease-fire.⁸⁶ Bunche's reference to the binding truce of July 15, 1948, as being no longer necessary was changed on the initiative of France and Canada so that the resolution passed by the

⁷⁹ *Id.* paras. 19–35, Article X of the Israel-Egypt agreement, Article XI of Israel-Jordan agreement, and Article VIII of the Israel-Lebanon and Israel-Syria agreements, *supra* note 70.

⁸⁰ Mohn, *supra* note 16, at 53, 58.

⁸¹ STONE, *supra* note 12, at 636.

⁸² DEDIJER, *supra* note 50, at 130.

⁸³ PROCS. OF HAGUE CONG., *supra* note 1, at 33.

⁸⁴ ROSENNE, *supra* note 51, at 83; STONE, *supra* note 12, at 638, 643; Levie, *supra* note 56, at 884; DEDIJER, *supra* note 50, at 69; PROCS. OF HAGUE CONG. *supra* note 1, at 33 (Bastid), 355 (Norwegian Report), 379 (Draper); 2 OPPENHEIM, INTERNATIONAL LAW 547, 597 (H. Lauterpacht, 7th ed. 1952).

⁸⁵ 4 GAOR, Supp. (No. 11) 25, paras. 141–62, UN Doc. A/966 (1949).

⁸⁶ 4 SCOR, Supp. (Aug. 1949) 6, paras. 1–3 of part III of UN Doc. S/1357.

Security Council stated that the four armistice agreements superseded both the first and recommended truce of May 29 and the second and binding truce of July 15. But to be on the safe side, the Security Council once more affirmed, "pending the final peace settlement," the order to observe an unconditional cease-fire which had been part of the now superseded, mandatory resolution of July 15, "bearing in mind that the several Armistice Agreements include firm pledges against any further acts of hostility. . . ." ⁸⁷

⁸⁷ *Id.* (434th mtg.) 35 (1949), UN Doc. S/1364; *id.* (435th mtg.) 2-3, 5-9, UN Doc. S/1367; *id.* Supp. (Aug. 1949) 8, UN Doc. S/1362.

THE MARCONA SETTLEMENT: NEW FORMS OF NEGOTIATION AND COMPENSATION FOR NATIONALIZED PROPERTY

*By David A. Gantz **

On September 22, 1976, the United States and the Government of Peru signed an agreement resolving the nationalization of the Marcona Mining Company's Peruvian branch.¹ The settlement, the intergovernmental negotiations leading up to it, and the expropriation itself are of more than passing interest. The settlement has been characterized by the U.S. Government as providing, when fully implemented, prompt, adequate, and effective compensation through a package—a combination of cash and long term sales relationship—which represents a relatively beneficial arrangement economically and politically for the Government of Peru. These arrangements were the more remarkable for having been concluded with a leading Third World country that has a long history of nationalization of foreign investment. In light of the frequency of expropriations of American-owned property abroad,² and of the fact that in one or more ways such expropriations involve issues of the public interest as well as those of private U.S. companies, the Marcona settlement has implications for the handling of other investment disputes.

I.

MARCONA AND PERU

In February 1952, thirty-nine years after the discovery of Peru's Marcona ore deposits, the Utah Construction Company, Marcona's predecessor (now parent) corporation, entered into a basic contract with the

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¹ Agreement between the United States and Peru Resolving the Marcona Mining Company Expropriation; *entered into force* Oct. 22, 1976. TIAS No. 8417, 15 ILM 1100 (1976).

² An unclassified research study prepared by the Bureau of Intelligence and Research of the Department of State reports that in the period July 1, 1971–July 31, 1973, "there were at least 87 instances of expropriation or nationalization, intervention, requisition, contract, or concession cancellation or renegotiation, and coerced sale." (Feb. 28, 1974).

Republic of Peru for the exploration and exploitation of the ore.³ Over the course of the next twenty years, Marcona expanded its operations and installed pelletizing facilities under authority of a series of amendments to the original concession agreements;⁴ by the early 1970's Marcona enjoyed the right to operate its principal mines through 1982, with rights to additional ore supplies which would have permitted it to continue operating its pelletizing facilities through 1984.⁵ The mining and shipping entity had grown into a highly efficient, integrated operation which mined and pelletized iron ore in Southern Peru for sale and shipment to iron ore consumers in Japan, the United States, and Europe. By 1974, Marcona indicated that it had invested almost \$170 million in its Peruvian mining, manufacturing, and port facilities, and a modern company town of 22,000 inhabitants had been created.⁶ In the years 1968-74, Marcona exported an average of more than nine million long tons of pellets annually, and produced foreign exchange of \$62.5-\$78.1 million per year.⁷ Between 1965 and 1968, iron ore constituted between 7 and 8.2 percent of Peru's total exports.⁸ Efficient utilization of a modern shipping fleet permitted Marcona to sell ore competitively in world markets despite Peru's greater distance from major consuming nations.⁹

However, by 1973 Marcona had become caught up in a complex cycle. Increasing operating costs in Peru had squeezed the company's Peruvian

³ Contract of Feb. 1, 1952, between Corporation Peruana del Santa and the Utah Construction Company, authorized by Law No. 11,664, Dec. 10, 1951. For a history of the discovery of the Marcona deposits, see D. GARCIA-SAYAN, *EL CASO MARCONA: ANALISIS HISTORICO-JURIDICO DE LOS CONTRAYOS* 13-20 (1975).

⁴ Contracts of Nov. 7, 1952; May 2, 1953; May 13, 1953; Feb. 26, 1960; Dec. 9, 1966; and Dec. 21, 1970.

⁵ While Marcona's rights to the principal deposits were to expire in 1982, the company had a separate, much smaller concession area, La Justa, which probably could have supplied sufficient ore for two additional years' production. See A. D. LITTLE, *AN EVALUATION OF MARCONA'S LA JUSTA MINE IN THE SAN NICHOLAS REGION OF PERU*, (Dec. 1972). Peruvian authorities, however, argued in the course of the negotiations that the La Justa deposits could not have provided sufficient ore for two years' full production.

⁶ Marcona Company figures, exclusive of depreciation. See MARCONA CORPORATION, *NATIONALIZATION OF MARCONA MINING COMPANY PERUVIAN BRANCH* 8 (1975).

⁷ *Id.* at 16 (table). For total tonnage (1953-1970), see GARCIA-SAYAN, *supra* note 3, at 186 (table 2).

⁸ GARCIA-SAYAN, *supra* note 3, at 185 (table 1).

⁹ In the iron ore business the freight cost is a significant portion of the delivered price (25% to 50% depending on ore and freight prices). Thus, a company's ability to minimize freight costs through efficient use of vessels, obtaining of cargo (usually oil) for the backhaul, etc., correspondingly increases its ability to deliver ore to major markets at competitive prices (and, of course, to generate profits). (The distance between Peru and Japan is more than twice that between Australia and Japan.)

According to the company, Marcona's shipping entity was consistently able to carry Peruvian ore at "area rates" below, and in some cases well below, current spot rates. Thus, in 1973 and 1974, a period of astronomical freight rates, the market rates averaged \$14.25 and \$16.25 per ton, respectively, while Marcona's area rates remained relatively constant, \$5.00 and \$6.50, respectively. MARCONA CORPORATION, *supra* note 6, at 20 (table).

earnings to the point where, from 1972 on, no profits were realized.¹⁰ Loss of profits meant that the "industrial community"—the company's workers—did not receive the share in the profits and ownership of the firm provided for in the Peruvian General Industries Law¹¹ and the workers thus became a significant lobby in favor of expropriation. On the other hand, increasingly efficient ore shipment and sales along with, in the former case, a great increase in tanker freight rates, were producing substantially increased profits in Marcona's shipping and sales subsidiaries, profits which were not taxed in Peru¹² and were not subject otherwise to Peruvian control. Increasing nationalism in Peru produced in July 1974 an important political document, the "Plan Inca," which provided, *inter alia*, for placing the exploitation, refining, and marketing of the iron ore deposits in the hands of the state and for creating a state entity responsible for all mining activities.¹³

II.

THE EXPROPRIATION

Discussions on a buyout arrangement began with a series of proposals made by Marcona to the Government of Peru in 1974 after a proposed \$65 million investment in expanded pelletizing facilities had been rejected. These proposals were designed in part to enable Marcona to continue the sale and shipment of Peruvian ore. Negotiations with a Special Commission ensued, but did not produce an accord, perhaps in part because of unrealistic expectations on both sides. In any event, on July 25, 1975, three days prior to Peruvian Independence Day, the Velasco Government abruptly expropriated the assets of the Peruvian operations of Marcona.¹⁴ The expropriation itself was accompanied by a denunciation of Marcona indicating that the Peruvian authorities viewed Marcona as the epitome of the evil multinational, and suggesting to observers that Marcona had been a deliberate choice for nationalization to serve as a political example of the regime's continued dedication to revolutionary ideals.¹⁵

¹⁰ Information based on Marcona's Peruvian tax returns and financial statements for years 1972-75. The partial returns for 1975, when the expropriation occurred, indicated that operations for 1975 probably would have shown a profit.

¹¹ Decree Law 18350 of July 1970, 9 ILM 1224 (1970), Arts. 21, 22. See F. Armstrong, *Political Components and Practical Effects of the Andean Foreign Investment Code*, 27 STAN. L. REV. 1597, 1604, 1616 (1976).

¹² Marcona Mining Company, Inc., was a U.S. (California) corporation with a Peruvian branch. The shipping company, Marcona Carriers, was chartered in Liberia, Marcona Sales, in Panama. All were wholly owned subsidiaries of Marcona Corporation, San Francisco, California.

¹³ GOBIERNO REVOLUCIONARIO DE LA FUERZA ARMADA, LA REVOLUCION NACIONAL PERUANA; MANIFESTO, ESTATUTO, PLAN 60-61 (Lima, 1974).

¹⁴ Decree Law No. 21228 of July 22, 1975, *El Comercio* (Lima), July 25, 1975.

¹⁵ In his message to the Republic, President Juan Velasco Alvarado noted that while . . . we never attack anyone, neither will we accept open or concealed aggression which produces a lessening of the rights of the Republic by powerful transnational consortiums which by doing so take on unacceptable and imperialistic attitudes which

Having regard to Peru's position of leadership among the Third World nations, the size of Marcona's investment in Peru, Marcona's general reputation as a model foreign corporate citizen, and the vituperativeness of the rhetoric, the expropriation attracted considerable interest in the United States.¹⁶ Peru appeared to have thrown down the gauntlet not only to the Marcona Company but to the U.S. Government as well.

The U.S. Government initially reacted with a relatively restrained statement by the Embassy indicating its expectation

that compensation would be amicably negotiated between the Government of Peru and the company in accord with generally recognized principles of international law.¹⁷

But in the next month, it resorted to the usual language of seeking "prompt, adequate and effective compensation."¹⁸

this government will never tolerate . . . because we respect profoundly the rights of foreigners and have an honest vocation of peace and justice, we demand identical conduct from those . . . who think and act in the dark past which we are eradicating in our country.

El Peruano, July 25, 1975; see American Embassy Lima's Airgram A-155, Aug. 1, 1975, encl. 2 (Unclassified).

The Minister of Mines, Jorge Fernandez Maldonado, carried the attack on Marcona and on multinational enterprises in general even further:

Once more our revolutionary process finds itself engaged in the battle being bravely fought by Third World countries to salvage their natural resources, since it is their soil from which those resources are extracted, processed, shipped, marketed, and put to industrial use in ways seriously detrimental to those countries, the raw materials, producers, which are the legitimate owners of their own wealth but must stand silently by while being cheated out of the fair returns their wealth should bring them.

The case of Marcona Mining Company is a typical illustration of the immoral conduct engaged in by the big transnational consortia when they are not challenged by a genuine revolution that safeguards its people's interests.

The stealth, the underhanded manner in which they conduct business, and the relentless efficiency with which they use the weakness of governments that act behind their peoples' backs are pursued to unscrupulous advantage by the transnational enterprises which simultaneously create and encourage that weakness, incessantly manipulating the so-called "public opinion" which they themselves bring into being through a certain press, written and spoken, and, most fundamentally, by advertising. This vast universe of economic, political, and cultural aggressive action is what we call imperialism.

El Peruano, July 24, 1975; see Airgram A-155, *supra*, encl. 2.

¹⁶ See Peru Seizes Iron-Ore Firm Largely Held by Cyprus Mines and Utah International, Wall Street J., July 28, 1975.

¹⁷ Lima telegram 6027, July 25, 1975 (Unclassified).

¹⁸ On August 4, the Peruvian Foreign Ministry and the Peruvian Ambassador in Washington received identical aides memoire, expressing United States Government concern that

Despite the fact that negotiations were in progress between representatives of Marcona and the Government of Peru, your Government abruptly expropriated Marcona without express provision for the payment of prompt, adequate and effective compensation for Marcona's rights and assets in Peru. My Government assumes, however, that the Government of Peru, which has amicable and beneficial relations with the United States and which in recent years has displayed a spirit of cooperation in settling other issues involving U.S. investments in Peru, intends to establish procedures immediately in order to arrive at the amount of compensation that Marcona is to be paid.

State Department telegram 182371, August 1, 1975, para. 2 (Unclassified).

In retrospect it is clear that by August 1975 a negative reaction against the expropriation had begun within the Peruvian Government itself; internal critics viewed it as a poorly timed, almost irrational act. Perhaps designed by certain elements to create a confrontation with the U.S. Government, it came at a time when Peru was already experiencing serious balance of payments problems and iron ore prices were at their lowest levels in a decade (although Peru may have believed, erroneously, that it would be able to market the ore in a manner which would provide a higher level of direct financial benefit to the nation).¹⁹ There seems little doubt, at least to this writer, that the expropriation of Marcona was the culmination of a series of events leading to increased dissatisfaction with President Velasco and, ultimately, to his removal at the end of August 1975. The original leader of the 1968 Peruvian Revolution was replaced by the more moderate President Francisco Morales Bermudez, who was faced with the difficult task of consolidating the Peruvian Revolution.

III.

INITIAL NEGOTIATIONS

While the rhetoric surrounding the expropriation and previous experience made Marcona Mining Company officials skeptical, with the encouragement of the U.S. Government they immediately sought to open negotiations with Peruvian officials aimed at resolving the matter of the expropriation.²⁰ The Government of Peru held at least one meeting with the company before the August 30 coup and several more in September, the most important of which took place at the Peruvian Cabinet level.

Nevertheless, by early October it had become clear that the new Peruvian Government had decided not to negotiate an expropriation settlement directly with Marcona. The reasons are not entirely clear, but one can speculate that they included a belief that negotiations with a foreign government would be less damaging politically for the regime than negotiations directly with a foreign company. Based on its experience with the bilateral claims agreement of February 1974,²¹ Peru probably felt that a settlement with the U.S. Government rather than the company could be negotiated on more favorable terms for Peru, perhaps at book value or a fraction thereof. Moreover, if the U.S. Government became directly involved, that government might be less likely to invoke the various legislative provisions which come into effect when a foreign country expropriates

¹⁹ The negotiations indicated a widespread belief on the part of Peruvian officials that Marcona's contract prices for ore were unnecessarily low, and that, if new contracts were concluded between the Peruvian entities and Japanese (or other) purchasers, materially higher prices would result.

²⁰ The Peruvian Government, in response to the August 4 U.S. note, affirmed its willingness to meet with Marcona "to clarify such issues as may arise from the expropriation." Note of August 8, 1975; Lima telegram 6423, August 8, 1975 (Unclassified).

²¹ Agreement between the United States and Peru of Feb. 19, 1974, TIAS No. 7792, 50 UST 227.

American-owned property without prompt, adequate, and effective compensation.²² Perhaps the most important factor may have been a conviction that the company's demands were unreasonable. At the same time Marcona officials, convinced that a directly negotiated settlement was impossible, urged the U.S. Government to become directly involved in the negotiations as soon as possible.

The decision of the Peruvian Government was communicated to the United States at very high levels, placing the U.S. Government in a somewhat awkward position in view of its traditional view that expropriation disputes are best resolved in negotiations between the expropriating government and the private firm. As Peru was in effect telling the United States that the Peruvian Government was *not* prepared to negotiate a settlement with a private firm but *was* willing to do so with the U.S. Government, the latter could either refuse (a decision which might have resulted in no compensation whatsoever and could have led to the application of legislative provisions cutting off aid and U.S. support for bilateral assistance to Peru) or attempt to work out some means by which the U.S. Government could involve itself directly in settlement negotiations.

After some deliberation the latter approach was taken, in part because representatives of the Marcona Corporation had strongly urged the Department of State to involve itself. The Department notified the Government of Peru that it was prepared to begin negotiations on a settlement, not as principal after espousal of the claim by the United States, but in effect as an intermediary, in an attempt to work out an arrangement which would be acceptable both to the Peruvian Government and to the Marcona Corporation, but which would be imposed on neither.

In mid-October 1975, a U.S. negotiating team made the first of what would be nine trips to Peru by U.S. negotiators seeking a settlement.

The initial stage of the negotiations was complicated by several factors. U.S. relations with Peru's revolutionary military government had never been easy, and the expropriation placed the U.S. Government in an uncomfortable position. The expropriation had brought to a halt virtually all exports of Peruvian iron ore. Many foreign companies were unenthusiastic about purchasing ore from an expropriated facility in view of the likelihood

²² These legislative provisions are the "Hickenlooper Amendment," Section 620(e) (1) of the Foreign Assistance Act of 1961, as amended; (suspension of bilateral assistance); the "Gonzalez Amendment," Section 12 of the International Development Association Act/Section 21 of the Inter-American Development Bank Act (opposition to lending by international financial institutions); and Section 502(b)(4) of the Trade Act of 1974 (loss of eligibility for trade preferences).

The U.S. view as to what constitutes prompt, adequate, and effective compensation is discussed in 8 WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1143 *et seq.* See also R. Lillich, *The Valuation of Nationalized Property by the Foreign Claims Settlement Commission*, in 1 *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW*, 95 (R. B. Lillich ed. 1972); Furnish, *Days of Revindication and National Dignity: Petroleum Expropriations in Peru and Bolivia*, 2 *id.* 55 (1973); Lillich, *International Law and the Chilean Nationalization: The Valuation of the Copper Companies*, 2 *id.* 120.

of a law suit by Marcona. Low steel production meant that most already had substantial inventories. The result was a loss of foreign exchange earnings to Peru of approximately \$8 million a month. At the same time, because of internal legal and political factors, the Peruvian Government, now the operator of the Marcona Mining Company complex through the state corporation, Hierro-peru, could not shut down the mine and lay off personnel.

The United States negotiators were well aware of the fact that under U.S. law, in the absence of a settlement or of negotiations which would lead to a settlement providing prompt, adequate, and effective compensation, the Government of Peru could lose its eligibility for trade preferences and bilateral assistance, as well as U.S. support for lending from the international financial institutions. The Government of Peru, both before and immediately after the negotiations, had assessed a variety of taxes and other charges against the Marcona Company which, if sustained, would substantially reduce the value of any final settlement paid to Marcona.²³ Finally, the expropriation decree itself had been drafted in such a manner as to appear to preclude compensation for the lion's share of Marcona's Peruvian assets.²⁴

There was thus a time pressure on both the Peruvians and the United States. It became clear that a final settlement, as in most expropriation cases, would take many months to work out, given the internal auditing procedures which would be required in Peru, the number of issues to be negotiated, and the belief of the U.S. negotiators that they needed to know much more about the financial worth of the company before encouraging the Government of Peru and the company to agree on a specific figure. Moreover, it was felt that, if there was some means of getting the ore moving while the negotiations continued, the climate for success would be measurably improved.

As a result, the initial negotiations, October–December 1975, followed two tracks. The first was a technical analysis of the value of the firm based on its Peruvian and U.S. financial statements. The second was a search for some means to get the ore moving without prejudicing the positions of either party. Parallel discussions with Marcona also led the U.S. negotiators to decide that additional information on Marcona's final worth, preferably from an independent, outside source, was necessary. As a result, the Departments of State and Treasury took the virtually unprecedented

²³ These included Marcona's 4% commission on C&F sales based on the 1966 contract; the applicability of a freight tax to Marcona vessels; excess demurrage charges; purchasing commissions; bonuses paid to foreign hire employees; and excess depletion. (The depletion claim was mentioned in the President's July 24, 1975, address, *supra* note 15.)

²⁴ Article 8 canceled the contracts and provided that "the installations of San Nicholas [Marcona's principal assets] shall be adjudicated free of charge to Hierro-Peru in representation of the Government." Subsequent clarification indicated that the portion of assets purportedly excluded from compensation by the decree was substantially smaller.

step of commissioning an independent study of Marcona's financial data by the Stanford Research Institute.²⁵

After several formulas had been tried and rejected, a brief, carefully worded intergovernmental agreement was signed on December 11, 1975.²⁶ In it, the two countries undertook to continue discussions aimed at reaching agreement on just compensation for Marcona and to complete the negotiating process within 90 days. Most importantly, by ratifying a freight contract between Marcona and Compania Peruana de Vapores, the Peruvian state shipping entity, the agreement provided a basis by which Peru and Marcona might cooperate to resume shipments of iron ore. This latter issue had proven to be most difficult because of Peru's insistence on handling both the production and sales sides of the operation, and its refusal to deal directly with Marcona in any significant respect. The Marcona Corporation, on the other hand, took the view that any interim arrangement must necessarily benefit Marcona as well as Peru if it was to give up its major leverage—the threat of legal action against prospective buyers.

Under the contract between the Marcona Corporation and Compania Peruana de Vapores, which was signed simultaneously, it was agreed that Marcona Carriers would carry all Peruvian iron ore shipped to traditional consumers in Japan, Europe, and the United States.²⁷ The freight rates at which the iron ore was to be carried were specified in the contract and in the intergovernmental agreement. It was understood that the contract rate included in each case a dollar per ton which was to be counted as part of the compensation ultimately to be agreed on by Marcona and the Government of Peru.²⁸ Marcona would benefit by being able to use its ships and by beginning to receive a small portion of the anticipated compensation. Peru would benefit from foreign exchange earnings and, politically, from a resumption of exports of a major resource and the legitimization of the expropriation.

IV.

CONTINUING NEGOTIATIONS

All concerned hoped that the December agreements would facilitate a prompt, final settlement of the Marcona expropriation. That result, however, proved considerably more difficult to achieve than initially antic-

²⁵ The procedures used were those applicable to contract research undertaken by the State and Treasury Departments with funds available for external research, after it was determined by the Treasury Department that the funds could properly be used for this purpose.

²⁶ Memorandum of Understanding, Dec. 11, 1975, TIAS No. 8173.

²⁷ Contract of Affreightment between Marcona Carriers, Ltd. and Compania Peruana de Vapores, Dec. 11, 1975, para. 1.

²⁸ The understanding did not become public until it was included in Article I(c) of the September 22, 1975, settlement agreement, *supra* note 1. The basic freight contract extended through December 31, 1976, although carriage of iron ore in slurry form was to continue through March 31, 1977. Contract of Affreightment *supra* note 27, para. 17.

ipated. The Peruvian internal auditing procedures took longer than expected, and the tax issues for political and economic reasons proved extremely difficult to resolve. Moreover, it became clear that the Stanford Research Institute study, essential to the negotiators' understanding of the company's true worth, would not be available to the U.S. negotiators until February 1976.

More substantively, and despite the repeated statements on the part of the U.S. negotiators, it became evident that the settlement range which the U.S. Government was discussing with the Government of Peru, based on the company's minimum figure (\$100 million), was far more than the Government of Peru had anticipated paying when it requested the United States to take over the negotiations directly. As a result, only limited substantive progress was made at three negotiating sessions that took place between January and March 1976, as those became primarily a continuing dialogue concerning the various tax claims raised against Marcona by various Peruvian Government entities.²⁹ By mid-March it appeared that a potentially unbridgeable gap might be developing between the net compensation that Marcona indicated it was willing to accept and what the Peruvian Government was prepared to pay. At that time both governments decided to reevaluate their negotiating positions before continuing.

The U.S. negotiators, conferring among themselves and with the Marcona Corporation, and with the benefit of the Stanford Research Institute study, came to the conclusion that some further concessions in terms of the amount of compensation would be necessary if a settlement was to be reached. They also decided that an effort should be made to avoid continuance of technical level negotiations, which might well drag on indefinitely or end in failure. Because of concern about the implications of failure, both in terms of compensation for Marcona and for U.S. relations with Peru and Latin America in general, the Departments of Treasury and State recommended to the President that he appoint Under Secretary of State Carlyle E. Maw, a former corporate lawyer with extensive negotiating experience, as his Special Representative³⁰ to negotiate a conclusion of the

²⁹ While the U.S. negotiators recognized that the issues were essentially ones of Peruvian tax and mining law, they felt it incumbent to point out to their Peruvian counterparts areas where the positions being taken by Peruvian authorities were in conflict with the Marcona contract or in potential conflict with Peruvian or international law. They also encouraged the Marcona Corporation to provide the local authorities with additional information substantiating Marcona's position that all valid taxes and claims had been paid.

³⁰ The Special Representative approach had been used successfully by the United States in its efforts to negotiate a lump sum settlement agreement with Peru several years earlier. Then Vice President of Manufacturer's Hanover, James R. Greene, had been made President Nixon's Special Representative to seek a settlement of pending expropriation claims. See D. A. Cantz, *The United States-Peruvian Claims Agreement of February, 1974*, 10 INT'L. LAWYER 389, 391 (1976). There was some evidence to indicate that the Peruvian cabinet ministers were conscious of the difference in rank between the head U.S. and Peruvian negotiators.

dispute fair to both the Government of Peru and the Marcona Corporation. On March 31, 1976, he was so designated.³¹

V.

FINAL NEGOTIATIONS

By raising the negotiations to a more senior level, the U.S. Government hoped to signal to the Government of Peru that it desired to move quickly to a just and mutually acceptable settlement. However, the U.S. negotiators were well aware that Peru's financial problems were worsening and that it would be virtually impossible to obtain a cash settlement from Peru consistent with the amounts that Marcona was prepared to accept and with what the United States believed could be characterized as prompt, adequate, and effective compensation. Building on the approach used in the December interim agreement, the United States, Marcona, and the Government of Peru individually and collectively sought means whereby a substantial portion of the compensation for the nationalization could be generated in such a manner as to improve rather than to worsen Peru's foreign exchange position by encouraging Peruvian iron ore sales. In the course of the January-March negotiations, the U.S. negotiating group had therefore concluded that the best hope of a settlement lay in some combination of cash, freight revenue, and iron ore. These were in fact the essential elements of the proposals which Mr. Maw carried with him when he first visited Lima in April 1976.

Four days of intensive negotiations with a Peruvian Ministerial group headed by Prime Minister Juan Fernandez Maldonado, during which time a wide variety of formulas was tried and discarded, led to agreement in principle on a package consisting of cash, an extended freight contract, and an iron ore sales contract, under which Marcona would buy ore at prices of \$18 to \$20 a ton in the expectation that, with its access to the U.S. market, the higher price at which it could resell that ore in the United States would yield a significant portion of the total compensation. The U.S. negotiators realized that many details remained to be resolved. However, they departed from Lima feeling that this was a basically just solution, one which would give Marcona fair compensation in such a manner as to minimize the adverse impact of a settlement on Peru's financial situation and, in fact, would have a positive effect in stimulating Peruvian sales

³¹ Letter from President Ford to President Francisco Morales Bermudez, March 31, 1976.

This action had the concurrence of the CIEP Interagency Staff Coordinating Group on Expropriation, which had been monitoring the negotiations since October 1975. The CIEP organized under the auspices of the White House Committee on International Economic Policy, with representatives from CIEP, State, Treasury, Commerce, the Agency for International Development, Overseas Private Investment Corporation, Export-Import Bank, and other agencies when their participation would be appropriate. The CIEP, representing as it did all affected government agencies, helped to keep the pieces of the puzzle in focus on the U.S. side and to assure that those agencies followed a consistent policy.

of iron ore. A few days later the Marcona board of directors also indicated its approval of the package.

Within less than a month, however, it became evident that Peru's ability to come up with a substantial cash payment had been reduced by the worsening financial situation and that the assumptions of the United States and Peru regarding some of the more important details of the proposed freight and ore sales arrangements differed significantly, even though the range of difference constituted no more than a small percentage of the value of the total package. While there was no indication on the part of the Government of Peru of any second thoughts about the agreement in principle as such, the completion of the internal legal and auditing procedures required under Peruvian law was apparently going to require additional time. A further negotiating session was held in May, but U.S. efforts to redesign the plan to meet all affected parties' legal, political, and economic requirements did not bring about a resolution of the major outstanding problems. As a result, the final round of negotiations, which it had been hoped could be scheduled by the end of June, was postponed on several occasions, as the Peruvian Government completed its internal procedures and intensified its efforts to secure private balance of payments financing out of which, *inter alia*, the cash portion of the settlement could be paid.³²

By the end of August, the Government of Peru had obtained the necessary preliminary commitments from U.S. and European banks regarding balance of payments financing and apparently had completed its internal audit processes.³³

Although there had been significant cabinet changes in the course of the summer, including the replacement of the Prime Minister, there was also increasing realization on the part of both the U.S. and Peruvian negotiators that a Marcona settlement, along with several other factors of great importance to the private sector internationally,³⁴ would be the best as-

³² Serious balance of payments difficulties brought on by increased oil prices, falling copper prices, the absence of significant iron ore exports, and other factors convinced the Peruvian authorities that interim external financing from private foreign banks was the only means of avoiding possible default on outstanding international debt. Discussions with prospective lending banks in the United States and Europe apparently began in April 1976 and continued until agreement in principle was reached in late August. The loan agreements were signed the week of November 30–December 3, 1976. See p. 487, *infra*.

³³ The U.S. negotiators were advised that under Peruvian law and practice no settlement could be effectuated until a final audit had been completed. The Price Waterhouse affiliate in Lima, which had been responsible for Marcona's books prior to July 1975, was hired by the Peruvian authorities to complete the company's financial statements, which then had to be reconciled with the various tax and other charges that were not reduced, adjusted, or eliminated as a result of the additional information provided by the U.S. negotiators and Marcona in the course of the year.

³⁴ These included a series of belt-tightening measures—increasing private sector productivity, control of public sector expenditures, rationalization of imports—as well as a 30.8% devaluation on June 28, 1976, designed to reduce imports and to improve Peru's balance of payments position. (El Peruano, June 28, 1976.) The Peruvian

surance of prompt completion of the balance of payments financing package.

VI.

FINAL SETTLEMENT

The elements of the package finally agreed to during a long and difficult mid-September negotiating session were similar to those which had been under discussion since April but reflected changes up to the last moment, making the package economically and politically more acceptable to the affected parties. The final intergovernmental agreement reflected the completion of Peru's internal auditing procedures, the desirability of increasing the self-financing aspects of the settlement (through extension of the ore sales concept), and the inability of the parties to resolve differences on specific shipping prices to be incorporated in the proposed extended shipping contract agreed to in April. It was ultimately in Peru's interest to agree to a limited resumption of Marcona's direct sales role. The resulting package consisted of \$37 million in cash, to be paid when the first tranche of the balance of payments financing became available to the Government of Peru; the proceeds of the original December 1975 ore shipping contract (which was in effect estimated to be \$2 million but in actuality amounted to somewhat more, reflecting the volume of ore carried before that contract expired); and an ore sales contract of four years' duration providing for the sale by the Peruvian ore sales entity, *Minero Peru Comercial*, of 3.740 million long tons of Peruvian iron ore pellets at stipulated prices ranging from \$18 per ton the first year to \$23 per ton the fourth.³⁵ While the Government of Peru estimated that the ore sales contract would be worth \$22.44 million to Marcona (on the stated assumption that Marcona's margin on the sale would average \$6 per ton), Marcona's actual gain from the contract may be more or less than that amount, depending on the actual prices at which it is able to sell the ore. The obligations in the agreement relate to performance of the contract, not to the amounts realized by Marcona, and neither the Marcona Corporation nor the Government of Peru has any legal basis to object if the contract produces more or less than the stated amounts.

Finally, the fact that the agreement constitutes a full and final settlement net of all Peruvian taxes or other charges meant that approximately \$3.6 million worth of intercompany transfers legally owed by the parent company in San Francisco to the Peruvian branch were forgiven, as well as some \$740,000 owed by Peru to Marcona for spare parts offloaded at Callao on August 5, 1976. The total package, depending on market conditions,

Government also settled an outstanding tax claim against the Southern Peru Copper Corporation which cleared the way for the completion of the latter's billion dollar Cuajone project in Peru.

³⁵ Article I(B) of the intergovernmental agreement; Peruvian Iron Ore Pellets Sales Agreement signed September 30, 1976, by Marcona, Inc., and *Minero Peru Comercial*.

should ultimately be worth \$62-75 million to Marcona, although the present value of the four-year payout is somewhat less.³⁶

The intergovernmental agreement which embodies the settlement also includes mutual quitclaims modeled along the lines of those contained in the 1974 intergovernmental agreement. However, claims are not fully extinguished until all of the obligations of the parties under it are met. Thus, the Government of Peru would not be barred from objecting to non-performance of the contract provisions by Marcona, and Marcona would not be barred from a similar objection against such actions by the Government of Peru or its governmental entities.³⁷

Because the Marcona Corporation was not a party to the settlement agreement, the Government of Peru asked the U.S. Government to obtain assurances from Marcona that Marcona recognized that the undertakings by Peru specified in the agreement, once implemented, would constitute a full and final settlement and that Marcona accepted its obligations under the ore sales and freight contracts. The U.S. Government obtained a letter from Marcona to this effect which is referred to indirectly in the agreement.³⁸

Understandably, the Government of Peru was not prepared to undertake an unconditional promise to pay Marcona the cash portion of the settlement, since without the balance of payments financing it had no adequate source of funds. In consequence, the promissory note which the Government of Peru issued on Marcona's behalf was conditional on that financing.³⁹ While the settlement agreement had been concluded as an executive agreement on the part of the United States, under Peruvian law the settlement itself and its key elements, the promissory note and the ore sales contract, required both the approval of the Peruvian Council of Ministers and authorizing legislation in the form of a decree law. Thus, it was agreed that the agreement should not go into effect until these necessary key steps had been taken. The decree law was issued on September 28,⁴⁰ and the ore sales contract signed in Panama⁴¹ on September 30.

³⁶ Marcona received \$37 million in cash. This amount, along with the \$3.6 million in direct remittances and the proceeds realized from the freight contract, constituted immediate payment. However, the gains from the ore sales contract will be realized over a period of four years. The present value of that portion of the settlement is, of course, less than the total sums ultimately realized, depending on the discount factor used in the calculations. These figures also disregard the fact that Marcona had to wait for more than a year after the expropriation before it received any substantial portion of the settlement or interest thereon.

³⁷ Agreement, *supra* note 1, Article IV, para. 2. The ore sales contract provides, however, for arbitration of disputes. See note 41, *infra*.

³⁸ Letter of Sept. 22, 1976, from Marcona Mining Company President Gordon Furth to Under Secretary Carlyle E. Maw; Agreement, Article VI.

³⁹ Promissory Note dated Oct. 1, 1976, para. 2.

⁴⁰ Decree Law 21644 of Sept. 28, 1976, *El Peruano*, Oct. 1, 1976. The law specifically approved the settlement agreement (Art. 1), the ore sales contract (Art. 2), and the issuance of a promissory note for \$37 million plus interest (Art. 3).

⁴¹ Article 17 of the Peruvian Constitution makes all commercial companies, without restriction, subject to the laws of Peru. However, Marcona insisted on the inclusion

Because of minor internal complications, the promissory note dated October 1 was not actually issued until October 22, 1975, and the bilateral agreement entered into force upon that date.

Between November 30 and December 3, 1976, the Central Bank of Peru, on behalf of the government, concluded balance of payments financing agreements with groups of U.S., European, and Canadian banks for a package of some \$40 million over the original \$300 million goal. Negotiations continued with Swiss and Japanese banks for additional financing. On December 20, 1976, the cash payment of \$37 million was made to Marcona, along with approximately \$600,000 in interest from October 1, 1976. As of May 1977, the freight contract had been fully implemented and Marcona had contracted for the sale of almost two million tons of pellets under the ore sales contract.

VII.

IMPLICATIONS OF THE AGREEMENT

A. Peru and Peruvian-U.S. Relations

First and foremost, the Marcona settlement removed an obstacle to the constructive relations to which both governments had been committed. A Marcona settlement, along with a resolution of the Southern Peru Copper Company tax disputes, cleared the path for the balance of payments financing which Peru required in the short term. Because it demonstrated that fair treatment for foreign capital could be assured within the Peruvian revolutionary process, the settlement also constituted a point of departure for increased private, as well as public, cooperation and practical progress on a variety of fronts. Finally, it removed all legal barriers to continued U.S. bilateral assistance, the furnishing of trade preferences under Title V of the Trade Act of 1974, and support by the United States for loans to Peru in the international financial institutions.⁴²

In addition, and despite the recognition of Peru's right to nationalize that the agreement constituted, the payment of compensation involved a substantial political cost. There must have been a temptation on the part of the Peruvian authorities, in this writer's view, to seek to bury or to hide the indirect elements of compensation embodied within the package, so as to make it difficult or impossible for the general public to appreciate the total amount of the settlement. The Peruvian Government, however, declined to do this. Rather, it insisted throughout that in the agreement proper and in its own legislation and press statements the elements of the settlement be clearly and openly presented. While the estimates as to

in the ore sales contract of a clause providing for arbitration of disputes under the rules of the International Chamber of Commerce, Paris (Clause XVI). Peruvian Government counsel determined that signature of a contract with such a provision would be proper only if the contract were signed outside the territorial jurisdiction of Peru. Panama was chosen because of its convenience and because of its well-developed commercial law. On Article 17, see also Gantz, *supra* note 30, at 390.

⁴² See note 22 *supra*.

the value of the ore sales agreement to Marcona are inherently impossible to establish precisely in advance, the approximate total worth of the settlement is on public record, along with the government's own appraisal of the total value of the properties (nearly \$100 million).⁴³

Perhaps equally important, however, is the fact that under the circumstances the settlement was a satisfactory one for Peru. While the settlement did not take full advantage of Marcona's sales and shipping expertise or come as promptly as it might have, in the end the Peruvian Government obtained a valuable iron ore mining and manufacturing complex at well below the replacement cost.⁴⁴ Elements of the agreement have or will provide Peru with economical shipping rates (for a limited time) and improved access to U.S. markets, which it has heretofore been unable to penetrate, and should generate over a period of time more than enough foreign exchange to pay the entire cost of the settlement. Sale by Minpeco, the Peruvian ore sales entity, to Marcona of the 3.74 million tons of pellets at the prices specified in the contract will produce \$61.27 million in foreign exchange. The December 1975 ore sales contract has provided, in retrospect, ocean freight rates that were extremely favorable even with the dollar per ton compensation included. The ore sales contract also provides a framework by which Minero Peru Comercial may supply tonnage in the U.S. markets for sales contracts extending beyond the four-year period.⁴⁵ Finally, the settlement, beginning with the December 1975 interim agreement, constituted recognition by both Marcona and the U.S. Government that the Government of Peru had a right to nationalize Marcona (provided just compensation was paid).

B. U.S. Expropriation Policy

From the U.S. point of view, the Marcona settlement was precedent-setting in several respects. It further reinforces conclusions which can be drawn from other recent settlements⁴⁶ that fair compensation is most

⁴³ The official Peruvian Government Communique on the settlement indicated that Marcona's assets had been appraised at \$98,392,151 (including \$28,540,000 attributed to the assets excluded from compensation under Article 8 of Decree Law 21228, *supra* note 14). Official Communique No. 03-OCI; Sept. 30, 1976.

⁴⁴ Estimated in 1972 at \$191,480,000. ARTHUR D. LITTLE, INC., AN EVALUATION OF MISCELLANEOUS ASSETS AT MARCONA'S SAN JUAN-SAN NICHOLAS OPERATIONS IN PERU (Report C-74993, Dec. 1972).

⁴⁵ Contract, *supra* note 35, Clause IV (7).

⁴⁶ In Venezuela, the nationalizations of both the iron ore and petroleum industries resulted in settlement consisting of payment of adjusted book value (in cash or bonds) plus a longer term sales arrangement/service contract with the former owners. See N.Y. Times, Aug. 30, 1975, at 27, col. 1 for details of arrangements on oil. With respect to steel, U.S. Steel was to receive \$95 million and Bethlehem \$21 million in 7 percent, ten-year Venezuelan Government bonds characterized as compensation for the concessions, installations, and equipment. Both companies were to continue to manage and operate the properties under a two-year technical services contract, with their role after that time limited to trader, intermediary, and (on a limited basis) provider of technical services. Ore sales agreements provided for continued ore sales (7 years for U.S. Steel, 5 for Bethlehem). Information from company sources; see also

likely to be achieved when the settlement consists not of cash alone but of a combination of cash and a continuing relationship (albeit more limited here than an economically ideal package would have produced), which generates foreign exchange, utilizes the foreign company's expertise, and helps to assure continued production of the resource under government management. At the same time, it illustrates the difficulty of introducing service relationships with the expropriated company into the final settlement, especially where the expropriation has had a high political content. The visibility of the services and the extent to which they are technical in nature are clearly relevant. Fortunately, the ore which forms a major part of the settlement is worth considerably more to Marcona because of that company's access to and expertise in selling in the U.S. market than it was to the Government of Peru which, because of market structures, had little chance of selling directly to U.S. ore consumers. The best evidence of this is the fact that the prices at which Minpeco will be selling ore to Marcona are roughly the same as those applicable to sales to major Japanese ore purchasers. If the marginal costs of producing 3.74 million tons of ore over approximately four years are considered, the benefit for Peru is even greater, given the fact that, except for fuel, almost all of the production costs are fixed.⁴⁷

Thus, this difference between the cost to the expropriating government and the value to the foreign firm of a continuing relationship may be broad enough to bridge over differences between methods of valuation for compensation purposes, namely the differences between adjusted book value, essentially the approach followed by the Government of Peru, and fair market value (usually going concern value) which in the U.S. view is required under the international law standard of prompt, adequate, and effective compensation.⁴⁸ It is the writer's view that the book value plus continuing relationship approach may offer the United States its best opportunity to maintain adherence to the principle of prompt, adequate, and effective compensation, if political factors permit an economically optimal continuing relationship to be worked out.

The Marcona settlement, once its terms become known, may also have an impact on the conduct of other developing nations' governments. It demonstrates that a major expropriation of foreign-owned property can probably not be carried out without substantial cost in terms of delayed or lost sales and foreign exchange earnings and that the ultimate settlement price may approach going concern value, even if a portion is indirect and deferred. A nation should at very least consider carefully the costs of major expropriation before acting and the possibilities for buyout

N.Y. Times, Dec. 8, 1974, at 17, col. 1. and Sec. IV, at 4, col. 2; *id.*, Dec. 9, 1975, at 66, col. 1.

⁴⁷ The only significant variable cost is diesel fuel for the pelletizing process; for political and legal reasons Peruvian workers cannot be laid off even when the facility is shut down. See generally Pasa & Santistevan, *Industrial Communities and Trade Unions in Peru: A Preliminary Analysis*, 108 INT'L. LAB. REV. 127 (1973).

⁴⁸ See note 22 *supra*.

arrangements that provide host government "ownership" and "control" while retaining company mining and manufacturing expertise. With an integrated multinational corporation, nationalization of one element (production) is likely to affect other elements (sales, distribution) in ways not subject to host government control, just as a company like Marcona cannot control the source of the ore, upon which the rest of the operation depends. The fact that Peru, a nation which has exercised a leading role within the Third World, was nevertheless prepared to reach an equitable settlement should not be lost on others.

It is also to be hoped that the role of the U.S. Government in arranging the settlement will become known, as it demonstrates the lengths to which that government went to avoid a serious confrontation over an uncompensated expropriation, as well as the possibilities for such assistance that are created when the U.S. Government and company interests are perceived to converge. While the U.S. negotiators insisted on a fair settlement, they came prepared to seek a package consistent with the requirements of the economy of the host country as well as those of the company.

There was, of course, precedent for the settlement of investment disputes with Peru through government-to-government negotiations led on the U.S. side by a personal representative of the President.⁴⁹ However, the Marcona settlement differs in several significant respects from the "Greene" Agreement of February 1974. With Marcona, in part because only one company was involved, it was in fact possible to discuss a settlement on terms other than cash, which in turn made it more likely that the total settlement package would approach going concern value. Secondly, the U.S. team was able to make independent judgments on the merits of the key issues, such as tax claims and valuation, because it had gathered and assessed information independently through its own resources and by commissioning an outside consultant (the Stanford Research Institute) to establish a reasonable range of values for the expropriated property.⁵⁰ Armed with this information, the U.S. negotiators were able to reason not only with the foreign government but with the American company as well. In fact both negotiations were required to reach a settlement acceptable to Peru and to Marcona and satisfactory to the U.S. Government. Finally, the presence of a Treasury official on the negotiating team and the involvement of the CIEP facilitated efforts to assure that the general approach was acceptable to all affected U.S. Government agencies and that all would give consistent support to the team's efforts.

There are, of course, questions in terms of U.S. Government time and resources raised by a negotiation of this nature. A four- to six-man negotiating team made nine trips to Lima in the course of a year; they and other officers of the U.S. Government in Washington and Lima spent hundreds of hours preparing for the discussions. U.S. Government funds were used to hire an outside consultant. The question may well be asked whether

⁴⁹ See note 30 *supra*.

⁵⁰ STANFORD RESEARCH INSTITUTE, EVALUATION OF THE MARCONA MINING COMPANY'S PERUVIAN ASSETS (March 1976).

such efforts are justified, even in the relatively few cases where direct negotiations with the foreign government—the approach preferred by U.S. firms and by the U.S. Government—do not result in a negotiated settlement.

In the occasional case when there appears no clear alternative, it is the writer's view that these efforts are justified. The U.S. Government has, of course, a direct financial interest in an expropriation settlement because of the treatment of expropriation losses under U.S. tax laws.⁵¹ Moreover, existing U.S. legislation necessarily requires that an expropriation by a developing country, if uncompensated, becomes a key issue in that country's relationship with the United States. As indicated earlier, under the Hickenlooper Amendment, the United States must, in the absence of a waiver,⁵² suspend foreign assistance to a country which expropriates U.S. property without compensating for it; similar provisions require the United States to vote against loans to such countries from the World Bank and Inter-American Bank. And under Section 502(b)(4) of the Trade Act of 1974, as amended, expropriation without negotiations leading to a fair settlement requires the suspension of generalized tariff preferences. These laws mean not only that U.S. bilateral relations may be severely damaged by an expropriation, but that, in the case of a country which enjoys a world or Third World leadership role, the spill-over effect will impinge upon our multilateral relations as, for example, in the Organization of American States. There the members other than the United States, from the largest to the smallest, object to linking eligibility for assistance to treatment of foreign investment.⁵³

⁵¹ For example under Sec. 1212(a) of the Internal Revenue Code of 1954, as amended, a corporation has a ten-year period in which to carry forward a foreign expropriation capital loss as a charge against tax liability. CCH, U.S. MASTER TAX GUIDE 328 (1976).

⁵² Since 1973 the provisions of the Hickenlooper Amendment have been made subject to waiver when the President determines and certifies "that such a waiver is important to the national interests of the United States" and reports the certification immediately to the Congress. (Sec. 15, Foreign Assistance Act of 1973; P.L. 93-189; 87 Stat. 714).

⁵³ Latin American governments consider such legislative provisions and their application to be "coercive measures," the use of which is prohibited under Article 19 of the Charter of the Organization of American States (April 30, 1948, 2 UST 2394, TIAS No. 2361, 119 UNTS 3; amended February 27, 1967, 21 UST 607, TIAS No. 6847). A "Draft Instrument on Violations of the Principle of Non-Intervention," prepared in 1959 by the Inter-American Juridical Committee (over the dissent of the U.S. member, James Murdock), included among specified acts constituting intervention "the use of coercive measures of an economic or political nature to impose the sovereign will of another state and obtain advantages of any kind." Doc. OEA/Ser. P-AG doc. 198; 24 February 1972. (As of 1976 no action had been taken by the OAS to approve the work of the Committee.)

In early 1972 the Government of Ecuador protested amendments to the Fisherman's Protective Act of 1967, which had the effect of suspending or reducing U.S. assistance to a country which seized and fined U.S. fishing vessels, on grounds that the legislation was in violation of the international obligation of the United States, specifically Article 19 of the OAS Charter. In its reply the U.S. note of March 14, 1972 stated, *inter alia*,

Beyond these direct relationships, the United States has a broad role in protecting American foreign investment abroad, both because of the benefits for the United States for such investment and because most developing nations can only obtain sufficient capital for economic development by tapping private as well as public capital resources. Uncompensated expropriations can destroy the investment climate, making it difficult or impossible for a country to attract the foreign capital it needs.

Nevertheless, if the approach taken with Marcona is to be used in the future, clear understandings as to the role of the affected company and as to how the U.S. Government will deal with the matter are essential. The government and the company must agree on what financial information will be furnished and on the extent of the discretion with respect to agreement with the foreign government which is to be given the official negotiators.

No company is likely to favor a direct U.S. Government role without being guaranteed a substantial say in how the negotiations are undertaken and, as indicated earlier, no negotiating team can operate effectively without the company's cooperation in providing financial data, technical advice, and, it may be hoped, creative suggestions for mechanisms that can become part of the solution. Certain elements of a settlement—such as the ore sales contract here—are best negotiated directly between the company and foreign government officials that will be charged with implementing them. On the other hand, the U.S. Government cannot properly assure the company that it will have an absolute veto over the settlement, as such assurances might lead to an unreasonable attitude on the part of the firm and place the U.S. negotiators in a difficult position vis-à-vis the foreign government. The precise nature of the relationship between the U.S. firm and the U.S. Government as intermediary will probably vary depending on the circumstances of the particular case, and the forging of a successful relationship constitutes one of the principal challenges to the U.S. negotiating team, one which is no less important than its working relationship with the foreign government.

Cost-sharing on the part of the company, however, is probably not a desirable practice, as the U.S. Government is not and should not be operating in a strict agency relationship with the company. The national interest may diverge from that of the company (as it would, for example, if the

My Government wishes to note, however, that the application of United States law to the granting or withholding of foreign assistance does not come within the terms of the international obligation to which your note referred. Assistance between nations depends upon a high degree of mutuality and such assistance is provided on terms that are acceptable to all parties concerned. An aid relationship is a function of many factors that can and do change, and nothing in international law or practice implies that either the furnishing or the acceptance of assistance is obligatory.

See also David A. Gantz, "Legal Aspects of Expropriation" (Background paper, Jan. 16, 1973), quoted in [1973] *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 334 (A. Rovine, ed.). For a more general discussion of economic coercion, see Lillich, *Economic Coercion and the International Legal Order* in *ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER* 73 (R. Lillich, ed. 1976).

company refused to accept an offer believed reasonable by the U.S. Government), and U.S. negotiators should not have to consider, in determining what course to follow, that the company must call the shots because it is financing the negotiations. Thus the absence of a direct financial link is probably essential if the U.S. Government is to play an independent and honest intermediary role.

VIII.

CONCLUSION

Given the continuing growth of nationalism in developing countries, expropriations of U.S. investments, especially in the resources sector, are likely to continue. Such expropriations, if not resolved, will poison U.S. relations with the expropriating country as long as U.S. law and policy relates expropriation to eligibility for assistance and related benefits. Under these circumstances, the U.S. Government must be prepared to step in to protect not only the affected company's interests but broader U.S. interests as well. The Marcona settlement will make the U.S. Government's role in such negotiations in appropriate circumstances more acceptable and, even in cases where the company negotiates directly with the foreign government, encourage the use of package settlements that take advantage of both the firm's expertise and the host country's economic and political needs.

NOTES AND COMMENTS

THE ORIGINS OF 200-MILE OFFSHORE ZONES

On March 1, 1977, the U.S. Government extended its fisheries jurisdiction from twelve to 200 miles from shore.¹ The U.S. move is one of a growing number of similar extensions to 200 miles in recent months. Although these new coastal state claims have not been uniform in content (some, like the United States have claimed only fisheries jurisdiction,² while others have claimed a 200-mile territorial sea³), they have been consistent in the 200-mile breadth specified. The coincidence of these 200-mile claims reflects the negotiations underway at the Third United Nations Conference on the Law of the Sea, where international support for a 200-mile Economic Zone (at least on the part of the ninety-odd states that have coastlines fronting on the open ocean) is recorded in the Revised Single Negotiating Text.⁴

As 200-mile zones evolve into the customary and possibly treaty law of the sea, the origins of this concept become of special interest. An exploration of the initial use of the 200-mile zone is complicated by the numerous ingenious legal and economic justifications that developed after the first claims were made.⁵ For an explanation of the forces that moved the

¹ Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 70 AJIL 624 (1976), 15 ILM 634 (1976).

² As of March 1977 the Office of the Geographer, U.S. Department of State, cites twenty-seven countries as claiming 200-mile fishing zones: Angola, Bangladesh, Benin, Canada, Chile, Comoros, Costa Rica, Cuba, Denmark (plus Greenland), Federal Republic of Germany, France, Guatemala, Iceland, India, Ireland (law not yet implemented), Maldives, Mexico, Mozambique, Nicaragua, Norway, Pakistan, Portugal, Senegal, Sri Lanka, United Kingdom, United States, U.S.S.R.

³ The Office of the Geographer lists nine states as claiming a 200-mile territorial sea: Argentina, Brazil, Ecuador, El Salvador, Liberia, Panama, Peru, Sierra Leone, Somalia.

⁴ UN Doc. A/CONF.62/WP.8/Rev. 1/Part II (1976).

⁵ Scholars not involved in the initial process of selecting a zone have subsequently sought to justify the 200 mile figure on a number of grounds. One argument is that 200 miles represents the width of the Humboldt Current off the coast of Chile and Peru. GARCIA SAYAN, NOTAS SOBRE LA SOBERANIA MARITIME DEL PERU (1955). Other arguments based on some form of nature's determinism include (1) the relationship between the offshore fisheries and the guano birds, (2) the relationship between the land and the waters, and (3) the relationship of the narrow continental shelf to the vast expanse of ocean (Lecture delivered by Director of Sovereignty and Frontiers, Peruvian Ministry of Foreign Affairs, at the CAEM, Lima, April 9, 1970).

Other scholars have sought in vain for legal precedent in the actions of other countries. One reported precedent was a 200-mile patrol zone supposedly declared by President Roosevelt on September 5, 1939. The width of the zone was said to reflect the prevailing technology—that is the range at which radar operated at the time. A. ARAMBURU MENCHACA, HISTORIA DE LAS 200 MILLAS DE MAR TERRITORIAL, (1973). No evidence of a Presidential Proclamation of a 200-mile zone can be found, how-

initial claimants to adopt 200- rather than 100- or 300-mile zones, we must look to the first assertion of 200-mile jurisdiction and to the accounts of those who participated in the making of that decision.

On June 23, 1947, Chile became the first country to claim a 200-mile zone, when it proclaimed national sovereignty over the continental shelf off its coasts and islands and over the seas above the shelf to a distance of 200 miles.⁶ The considerations motivating Chile's claim were several. Chilean business interests were seeking such a measure to protect their new offshore whaling operations. Chilean legal specialists, on behalf of these interests, thought that a 200-mile claim was consistent with the security zone adopted in the 1939 Declaration of Panama.⁷ And the distinction in the claim between the continental shelf and the superjacent waters was added to strengthen Chile's assertion that the claim followed the precedent set by the United States in the Truman Proclamations of September 28, 1945.⁸

The distance finally adopted could as easily have been 50 or 300 miles as 200 miles. The whaling interests wanted protection only to a distance of 50 miles. They were nonetheless advised that a 200-mile claim was necessary to take advantage of the precedent afforded by the Declaration of Panama.

ever, in governmental records of the period or in subsequent compilations of U.S. claims to "defensive sea areas," "maritime control areas," and "customs enforcement areas" 46 U.S. Naval War College, INT'L. LAW DOCUMENTS 1948-49 at 157-80 (1950); and U.S. Naval War College, INT'L. LAW: SITUATION AND DOCS, 1956 at 601-07 (1957). The President's September 5, 1939 declaration of neutrality refers only to "areas under national jurisdiction." Proclamation Concerning Neutrality of United States, Exec. Order No. 8223, F. R. Doc. 39-3240, filed Sept. 5, 1939, 4 Fed. Reg. 3809 (1939). Similarly, a subsequent elaboration of naval duties under this proclamation makes no reference to a 200-mile zone (*id.* 3819-23). Naval duties, as elaborated by the President's secretary, were to include the establishment of a patrol force of at least 150 vessels to provide intelligence on the movements of belligerent submarines and warships. As the patrol force grew, the area covered would be extended gradually "until it has reached the waters adjacent to Puerto Rico, the Antilles and the Canal Zone." Ultimately the patrol system would operate up to 200 to 300 miles off the U.S. shores. "U.S. Coastal Patrol Swings Into Action," N.Y. Times, Sept. 7, 1939, at 13. President Roosevelt was explicit that the patrol was merely to gain information and did not determine U.S. territorial limits. He preferred to define America's territorial waters flexibly—as extending "as far as our interests need it to go out." Press Conference 579, Sept. 15, 1939 in 14 COMPLETE PRESIDENTIAL PRESS CONFERENCES OF FRANKLIN D. ROOSEVELT 166-74 (1972). As for the connection between the size of a patrol zone and the state of military technology, it should be noted that the operational range of radar was less than 200 miles in 1939.

⁶ Presidential Declaration Concerning Continental Shelf, June 23, 1947. UNITED NATIONS LEGISLATIVE SERIES, LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS, UN Doc. ST/LEG/Ser.B/1, at 6 (1951); 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 794-96 (1965).

⁷ Declaration of Panama, 1 DEPT. STATE BULL. 331-33 (1939).

⁸ Presidential Proclamation No. 2667, Concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea-Bed of the Continental Shelf, 59 Stat. 884 (1945) and Presidential Proclamation No. 2668, Concerning the Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas, *id.* 885.

This advice was based on inaccurate information about the 1939 Declaration, which in fact had delineated a 300-mile security zone off the Chilean coast.

Developments during and immediately after the Second World War provided the context in which Chile's 200-mile claim appeared both reasonable and necessary. During the Second World War, European pelagic whaling operations in Antarctic waters were suspended. Cut off from European sources of fats and oils and protected from competition with foreign whaling vessels, a Chilean firm, *Compañía Industrial (Indus)*, went into the whaling business to supply its production of soaps and cooking oils. The attractiveness of these whaling operations was enhanced by the development of a new technology for dehydrogenizing the meat of the sperm whale (*cacholote*).⁹

While *Indus* was developing a substantial interest in its protected whaling operations, the war in Europe was drawing to a close and plans were being laid for a return to Antarctic whaling. The European interest in a prompt renewal of whaling operations reflected the serious food shortages in Europe and dwindling supplies of fats and oils.¹⁰

The ability of Europe to respond to these needs was, however, limited by a number of international conservation agreements to regulate pelagic whaling that had been reached in the 1930's.¹¹ Great Britain took the lead in pressing for a temporary relaxation of these agreements. In early 1944 it convened a meeting in London and, with the support of the Norwegian Government-in-Exile, proposed that the open season on whaling should extend from November 24 to March 24 in the first whaling season after the termination of hostilities in Europe.¹² Other proposals for easing the restrictions of the 1937 agreement were resisted by the United States, among others, which was concerned with preserving whale resources. It was agreed, therefore, to continue to restrict the operation of factory ships to Antarctic waters. The United States and Norway were successful in press-

⁹ Letter to author by Jermán L. Fischer, March 15, 1976.

¹⁰ [1944] 2 FOREIGN REL. U.S. GENERAL: ECONOMIC AND SOCIAL MATTERS 934 ff. (1967).

¹¹ The first international agreement was negotiated under the auspices of the League of Nations in 1931. Convention for the Regulation of Whaling, Sept. 24, 1931; T.S. No. 880, 49 Stat. 3079, 155 LNTS 349, signed but not ratified by 26 states. The convention was limited to baleen (whale bone) whales and did not fix a total or species limit on harvesting. Then in 1937, an Agreement on the Regulation of Whaling (signed June 8, 1937 by nine governments, T.S. No. 933, 52 Stat. 1460, 190 LNTS 79) introduced several new principles into the conservation of whales. It provided for inspectors, for certain closed areas, for an open season in waters south of 40° latitude from December 8 to March 7, and for a maximum of six months operation per year for any land station. A review conference was held the following year and adopted a protocol amending the 1937 agreement. Protocol Amending the Agreement of 1937, London, June 24, 1938, T.S. No. 944, 53 Stat. 1794, 196 LNTS 131. A further conference was held before the war and adopted several additional recommendations. 1 DEPT. STATE BULL. 37 (1939).

¹² The years were not specified in the interests of security but were privately agreed to refer to 1944-45. [1944] 2 FOREIGN REL. U.S., *supra* note 10, at 942-43.

ing for a maximum limit on catch in Antarctic waters of 16,000 blue whale units.¹³ This represented the first total limit that had ever been agreed upon.

Owing to the absence of Irish accession to the 1944 protocol, a supplementary protocol¹⁴ was concluded in London in October 1945 to bring the 1944 protocol into effect for those nations that had adopted it. The delay in giving effect to the 1944 protocol meant that the temporary relaxation of treaty provisions did not occur until the season of 1945-46. The reasons behind a relaxation for a first whaling season—a shortage of fats and oils and the absence of pelagic whaling during the war—continued to apply in 1946. A protocol of March 15, 1946¹⁵ was, therefore, agreed upon to permit certain factory ships to continue whaling operations after March 24. Then on December 2, 1946, a further protocol¹⁶ was signed in Washington extending the relaxation of whaling regulations into the second season of 1946-47.

Physical constraints made it impossible to resume full-scale whaling at once. The whaling vessels that it was hoped would be released upon the termination of the war¹⁷ simply did not exist. Thus, during the stipulated 1946-47 season, the total allowable blue whale units could not be caught in the specified time. In these circumstances, it was agreed again to extend the whaling season. Moreover, because of the undercapacity of other whaling nations and the dire food shortages in Japan, two Japanese factory ships were allowed to operate in the Antarctic under the supervision of the Supreme Commander for the Allied Powers (SCAP).¹⁸ By the 1947-48 whaling season, however, problems of undercapacity no longer existed in Europe. Indeed, with U.S. plans to allow a further "emergency" Japanese whaling expedition in 1947-48, despite the strenuous objections of its allies in the Far Eastern Commission,¹⁹ the situation of overcapacity in Antarctic whaling would once again obtain.

Thus, by 1947 Chile's infant whaling industry found itself threatened by ever increasing levels of competition with efficient distant water whaling fleets. There was also the prospect that the Chilean Government might become a party to international agreements which would limit the access of Chilean companies to the offshore whaling resource. Although Chile was not a party to the international protocols of the 1930's and mid-1940's among the pelagic whaling powers, the Chilean Government did participate in the Whaling Conference that met in Washington in December 1946. In addition to extending the protocol that had been agreed upon in March to relax the 1937 whaling regulations, the Washing-

¹³ *Id.* 939.

¹⁴ Supplementary Protocol Concerning Whaling, signed at London, October 5, 1945; [1946] Gr. Brit. T.S. No. 44 (Cmd. 6941); S. EXEC. DOC. J. 79th Cong., 1 Sess., (1945).

¹⁵ 146 BRIT. AND FOR. STATE PAPERS 498 (1946); [1946] Gr. Brit. T.S. No. 44 (Cmd. 6941).

¹⁶ TIAS No. 1708, 62 Stat. 1577, 161 UNTS 361.

¹⁷ [1944] 2 FOREIGN REL. U.S., *supra* note 10, at 936.

¹⁸ [1947] 6 FOREIGN REL. U.S.: THE FAR EAST 195 ff. (1972).

¹⁹ *Id.* 212 ff.

tion Conference reached agreement on an International Convention for the Regulation of Whaling to replace the 1937 agreement.²⁰ The Convention established an International Whaling Commission, which was empowered to amend the code of regulations attached to the Convention "by adopting regulations designating protected species, fixing closed seasons and waters, limiting total catches and the size of whales taken."²¹ The Commission was authorized to make recommendations to contracting governments to effectuate its regulations. Chile and Peru signed but never ratified this Convention.

Before the Chilean Government could proceed further down the path of international regulation of offshore whaling, the officials of Compañía Industrial contacted the Chilean President regarding their special problem and recommended a plan to resolve it.²² In developing a proposal to exclude foreign whaling from nearshore areas, Helmuth Heinzen, the general manager of Compañía Industrial, had sought the assistance of Fernando Guarello, the firm's lawyer. Sr. Guarello was unable to find within existing Chilean laws and regulations the means of excluding foreign vessels. He therefore turned to an international legal expert, Germán Fischer, to seek possible international precedents for a claim to offshore jurisdiction. The task was not an easy one, by Sr. Fischer's account. After substantial research, the most promising precedent seemed to be that of the October 1939 Declaration of Panama. Sr. Fischer found an account of this Declaration together with a rough sketch of the security zone in a Chilean periodical in his library.²³

The extent as well as the terms of the 1939 Declaration were ill suited to serve the needs of the Chilean whaling company. The zone had been established at U.S. initiative upon the outbreak of war in Europe to serve as a "neutral" or "safety zone." Within the limits of this zone, belligerents were to be prohibited from engaging in hostilities.²⁴ The security zone never applied to Canadian waters and ceased to be relevant when the United States became a belligerent. Even before then, it was apparent that the zone served as a hiding place for belligerent vessels and that its neutrality was not in fact observed. The width of the security zone under the Declaration of Panama varied from 300 to 500 miles.²⁵ The zone off

²⁰ TIAS No. 1849, 62 Stat. 1716, 161 UNTS 72.

²¹ 4 WHITEMAN, *supra* note 6, at 1056.

²² Story may be found in T. Barros, "Las Doscientos Millas," *Mercurio*, (July 19, 1974), also in letter from Germán Fischer to author, March 15, 1976.

²³ Article by J. Bardina, *LA SEMANA INTERNACIONAL* (January 1940).

²⁴ Declaration of Panama, *supra* note 7, at 332. Among the nations represented at the Consultative Meeting of Foreign Ministers of the American Republics, Brazil explicitly declared that "the sea outside territorial waters, only three miles from our coast, . . . not only is not ours, but in it we are at the mercy of any action contrary to the free and peaceful expansion of our sovereignty . . ." *Id.* 333.

²⁵ The U.S. Government was responsible for determining the size of the security zone in the Declaration of Panama. The Office of the Geographer of the Department of State was first asked to draw zones using radii ranging from 300 to 1,000 miles. The 300-mile radius was determined to be adequate and a map embodying this width was sent to President Franklin Roosevelt. Roosevelt personally drew the straight lines link-

Chile had been closer to 300 miles wide, although the map that was part of the journal article available to Sr. Fischer made it seem somewhat less.

When notified of a possible legal precedent for a claim to 200 or 300 miles from shore, the company officials were initially reluctant to put forward the idea. Because of the limited scope of their whaling operations, they were looking for protection only to roughly 50 miles. Sr. Fischer was persuasive. He argued that in order to withstand the foreign reactions that would be generated by a claim to exclude distant water whaling, it was necessary to base the action on some international precedent—in this case on the Declaration of Panama.

Once convinced of the need to claim a 200-mile zone, company officials began consultations at home and in neighboring countries to garner support. Guarello secured the support of Chile's President, Gabriel Gonzalez Videla.²⁶ Helmuth Heinzen sought out businessmen in Peru and Ecuador who might want the protection afforded by national offshore zones. At the same time, Guarello, with Tobías Barros Ortíz, a former chancellor and Chilean ambassador, visited government officials in the same countries.

The offshore resource interests of Chile's neighbors differed from those of Chile, but both Ecuador and Peru were favorably disposed toward offshore claims, albeit for different reasons. Neither Peru nor Ecuador had coastal waters within the Antarctic region that would be subjected to international regulation. Occasional foreign whaling expeditions took place off their shores, but their own local fishermen rarely operated beyond twenty-five miles from shore.²⁷ Nonetheless, they wanted to protect their fishing fleets, and the prospect of American tuna fishing in waters off their shores was growing. Peru was particularly interested in developing a fishmeal industry based on its vast anchoveta resources and to this end had imported equipment from the defunct California sardine industry.²⁸ Thus Peru adopted a 200-mile policy²⁹ shortly after Chile. Ecuador formally took this step in 1951.³⁰

Chile's 200-mile zone was proclaimed on June 23 and Peru's was promulgated on August 1, 1947. The differences between the two pronouncements reflect the different national goals that each was seeking to fulfill. The Peruvian claim, for instance, omitted any reference to the

ing the outermost points of the 300-mile circles. It was this map, only slightly altered by the Office of the Geographer, that became the officially delineated zone for the Declaration of Panama. For the accurate map and description of its origins, see [1939] 5 FOREIGN REL. U.S.: AMERICAN REPUBLICS 35 (1958).

²⁶ President Gonzalez evidenced his enthusiasm for this policy in G. VIDELA, MEMORIAS 835 (1975).

²⁷ [1948] 9 FOREIGN REL. U.S.: THE WESTERN HEMISPHERE 731-32 (1972).

²⁸ B. & R. SMETHERMAN, TERRITORIAL SEAS AND INTER-AMERICAN RELATIONS 91 (1974).

²⁹ Presidential Decree No. 781 of August 1, 1947. UN Doc. ST/LEG/SER.B/1, *supra* note 6, at 16; 4 WHITEMAN, *supra* note 6, at 797-98.

³⁰ Maritime Hunting and Fishing Law (Decree No. 003, February 22, 1951) AÑO III, REGISTRO OFICIAL, No. 756, March 6, 1951 at 6219-20; 4 WHITEMAN, *supra* note 6, at 799-800; UNITED NATIONS LEGISLATIVE SERIES, LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS, UN Doc. ST/LEG/SER.B/1/Add. 1 (1952).

protection of whaling so prominently featured in the Chilean claim. Instead, Peruvian concerns centered on protecting the abundant fisheries off its shore from neighbors as well as from distant water fishing states. Thus, Peru did not include the stipulation found in the Chilean decree that reciprocal fishing rights would be observed with other states. Peru's fisheries are richer than those of Chile and the Peruvian interest in fishing off Chile or, for that matter, off any other country was and remains remote at best.

The similarities between the Chilean and Peruvian 200-mile proclamations are equally noteworthy. Both claims are justified in terms of the precedents afforded by other states' claims. Not only are the Truman Proclamations cited as precedent, but they are also reflected in the texts of the Chilean and Peruvian claims. Although the west coast of Latin America has only a very narrow continental shelf, some effort was made to model the Chilean and Peruvian claims along the lines of the Truman Proclamations on the Continental Shelf and on Fisheries. Thus both the Chilean and Peruvian 200-mile claims make separate mention of the shelf and the superjacent waters. The incorporation of elements of the Truman Proclamation on the Continental Shelf was an afterthought at most, since the contents of the Chilean and Peruvian claims clearly reveal a preoccupation with offshore living resources, not with the resources of the continental shelf. The fact that the United States had proceeded unilaterally in 1945 to lay claim to offshore resources no doubt encouraged the Chilean and Peruvian Governments to believe that their offshore claims were not inconsistent with developing international practice. The U.S. claims, however, were not a direct stimulus to the 200-mile claims. Rather, these claims found their origin in the concerns of a weak whaling industry to protect its exclusive access to a resource and in the mistaken interpretation of a 1939 security declaration and zone.

ANN L. HOLLICK *

REPORT OF THE THIRTEENTH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The Thirteenth Session of the Hague Conference on Private International Law convened at The Hague from October 4 to 23, 1976. The Conference now has twenty-seven members, all of whom were represented. This was the fourth session at which the United States participated as a member of the Conference.¹

Following the decisions made at the end of the 1972 session, the Netherlands State Commission selected the following substantive topics for the agenda: (1) the law applicable to matrimonial property regimes; (2) celebration and recognition of the validity of marriages; and (3) agency.

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¹ The U.S. delegation consisted of Ambassador Richard D. Kearney, Chairman, Philip W. Amram, Robert Dalton, Willis L. M. Reese, and Arthur von Mehren.

The session was organized into four commissions, three of which undertook the three topics just listed; the fourth commission, as at previous sessions, occupied itself with administrative problems, technical problems of the drafting of general and conventional clauses, and the selection of topics for future work.

The session produced only two conventions. The discussion of agency was not completed, but sufficient progress was made to warrant the appointment of a Special Commission to meet before the first of July, 1977 for approximately ten days with power to prepare a Final Act on this topic.

The following will summarize the two conventions which were completed and the decisions reached by Commission IV on future work and on technical matters.

THE CONVENTION ON THE LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES²

This Convention will be of limited interest in the United States since the problems involved are of minor importance in common law countries, although of substantial importance in civil law countries.

The Convention's interest in common law countries is diminished by Article 1 which excludes problems relating to maintenance obligations between spouses, succession rights of a surviving spouse, and the capacity of spouses.

The basic concept is the right of the spouses to choose the applicable law, the choice being limited to (1) the nationality of either spouse; (2) the habitual residence of either spouse; or (3) the first place where either spouse establishes a new habitual residence after marriage. The choice may include real property, so that interests in real property may be governed by the law of a strange state, a conclusion inconsistent with the general principle of the common law.

CONVENTION ON CELEBRATION AND RECOGNITION OF THE VALIDITY OF MARRIAGE³

This Convention is intended to replace the 1902 Convention,⁴ which was unsuccessful. It deals with two related but independent topics. Chapter I sets forth rules relating to the celebration of marriages and the duty of states, under designated circumstances, to apply a foreign law. Chapter II sets forth the rules for recognition of the validity of marriages entered into in a foreign state.

Fortunately the Convention provides specifically, in Article 16, for the right of any state to exclude Chapter I. If the United States should elect to ratify this Convention, it will unquestionably elect this privilege. It would be wholly unrealistic to suggest that the thousands of civil and

² Text in 16 ILM 14 (1977).

³ *Id.* 18.

⁴ Convention of June 12, 1902 for the Settlement of Conflicts of Laws in Matters regarding Marriage. English translation in [1904] FOREIGN RELATIONS OF THE UNITED STATES, 527.

religious officials in the United States who are authorized by state law to celebrate marriages should be required to apply an unknown foreign law rather than the law of their own state.

Chapter II is more interesting and might conceivably receive support in the United States.

The Convention excludes marriage by military authorities, marriages on board ships or aircraft, proxy marriages, posthumous marriages, and informal (common law) marriages. Only conventional religious and civil marriages are included.

The general rule is that, if a marriage is validly entered into at the place of celebration or subsequently becomes valid under that law, it will be recognized. This includes a marriage celebrated by a diplomatic agent or consular official under his own law, if the state of celebration does not forbid it. If a marriage certificate is issued by a competent authority, the marriage is presumptively valid.

A requested state may refuse to recognize a marriage, if, under its law: (i) one of the parties was already married and that marriage has not later been dissolved or annulled; (ii) there was impermissible consanguinity of the spouses, by blood or adoption; (iii) there was a violation of mental capacity to consent; (iv) there was absence of actual consent; and (v) the recognition is manifestly incompatible with public policy (*ordre public*). Conversely a state may adopt a rule of recognition more favorable than the Convention demands.

There is an interesting solution of the important matter of the "incidental question." In actual practice, the issue of the validity of a marriage rarely arises in the abstract; it is almost always connected with some other question, for example, the right to support and maintenance, the right to inherit under the intestate laws or to take against a will, or the meaning of the word "husband" or "wife" in a deed, will, or other document. A difference of opinion exists between those who feel that the same rule of validity or invalidity should apply in all cases and those who feel that each issue should be dealt with *ad hoc*, so that parties may be married for one purpose but not for another. The doctrine of the "divisible divorce" is an analogous illustration.

The Convention states the basic principle that its rules will apply in all cases, even when another question is in issue. It then states a single exception, namely, when the choice-of-law rules of the forum direct that the other question is to be governed by the law of a state which has not adopted the Convention. In that case the rules of the Convention will not regulate recognition by the forum of the validity of this foreign marriage, but the forum will decide that issue on the basis of its own rules of recognition, ignoring the Convention. This provision, like many decisions of the Conference over the years, is a compromise between the opposing views, which should not work out badly in actual practice.

If Chapter I is excluded, the United States could approve this Convention. Since a state may recognize marriages more freely than the Convention directs, approval of the Convention would not forbid recogni-

tion of any marriage which is now recognized. The only effect in the United States might be to require recognition of a foreign marriage which, under existing law, is not now recognized in the several states. It is not easy to find illustrations of this in the face of the five categories listed above which permit nonrecognition plus the public policy provision.

Approval of the Convention would result in recognition of U.S. marriages in other Convention countries, within the rules of the Convention, and this might sometimes be advantageous to U.S. nationals. On the other hand, the advantage would not be great, since there do not appear to be any substantial number of cases where a marriage entered into in the United States is now refused recognition abroad, but recognition would be required under the rules of the Convention.

TECHNICAL AMENDMENTS AND PROGRAM FOR FUTURE WORK

A number of proposals were adopted with respect to certain general clauses of the Hague Conventions, including terms of accession, signature, and ratification, provisions for reservations and reciprocity, and preparation of federal-state clauses.

In the field of future work, the most important debate dealt with the proposal of the United States at the 1972 session to include the general topics of contracts and torts. The proposal had excited opposition among the members of the E.E.C., which had been working in the same field and had produced a first draft which had been circulated for discussion. It was suggested that the U.S. proposal was designed to block further work by the E.E.C., a suggestion that was vigorously denied. The United States pointed out the many advantages of simultaneous work on the same subject by a smaller regional group and a larger worldwide group.

A Special Commission which met in January, 1976 to review the problem had failed to resolve it and had left it to the Thirteenth Session for decision. However, the initial vote was 10 to 10 with 4 abstentions. Under the rules of the Conference, this tie vote required a second vote. On the second round, one of the original abstaining members voted in the negative and the final vote was 11 to 10, with 3 abstentions.

The unfortunate results is that the topics of contracts and torts are now excluded indefinitely from the list of future topics for consideration by the Conference, until some future date when the matter can be brought up again.

The Conference recommended three topics for the Fourteenth Session in 1980: (a) legal aid and security for costs; (b) "legal kidnapping" of children by a parent; and (c) a possible Protocol to the 1955 Convention on the International Sale of Goods to deal with consumer sales. On the list of topics for future work the Conference recommended (a) negotiable instruments; (b) licensing agreements and know-how; and (c) revision of the 1955 Convention on Conflicts between the Laws of Nationality and Domicile.

PHILIP W. AMRAM *

* The author is chairman of the Civil Procedural Rules Committee of the Supreme

THE FRANCIS DEÁK PRIZE

The Board of Editors of the *American Journal of International Law* has awarded the Deák Prize for 1977 to Richard W. Edwards, Jr. for his article on "The Currency Exchange Rate Provisions of the Proposed Amended Articles of Agreement of the International Monetary Fund" which appears in the October 1976 issue of the *Journal* at page 722. The Prize, in memory of the late Francis Deák, is awarded for an especially meritorious article appearing in the *Journal*.

The Board of Editors extends its congratulations to Mr. Edwards and expresses its appreciation to Mr. Philip Cohen, the President of Oceana Publications, Inc., through whose generosity an award is made to the recipient of the Prize.

Court of Pennsylvania and was Chairman of the Advisory Committee of the United States Commission on International Rules of Judicial Procedure. He has been a member of each U.S. delegation to the Hague Conference on Private International Law since 1956 and was Vice-Chairman of the State Department's Advisory Committee on Private International Law until 1976. The views and comments expressed are his personal views only and do not necessarily represent the views of the Department of State or any other member of the 1976 delegation.

CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters shall be published and to edit any letters printed.

TO THE EDITOR-IN-CHIEF:

March 23, 1977

The October 1976 issue of the *Journal* contains a note on the use of the Jessup International Law Moot Court Cases in Political Science Departments.¹ I should like to give you a brief report on the use I have made of them at Tulane Law School.

In conducting seminars in International Law in the past, I have usually required the writing of papers and those as a rule turned out to be what one might call "research" papers. One difficulty with the format is that the papers tend to vary considerably in length and depth of research, which makes it difficult to work out a fair system of grading. In the fall semester of the academic year 1976-1977, it occurred to me I could use for a seminar of twelve students the cases prepared over the years for the Jessup International Law Moot Court Competition. I wrote the Society and was supplied within a short time with a number of the previous cases, as well as a copy of the official rules for the Competition.²

The students were divided into six groups of two. Each group was assigned a different case and required to write two briefs, one on each side of the case. The two students in each group could and were indeed invited to collaborate with each other in the research and discussion of the issues, but each was responsible for the writing of his own brief and was graded on it.

It turned out to be a very successful format. In my opinion, the success was due essentially to the element of adversary advocacy in the format. When research papers were the rule in previous years, this element was, of course, missing. In using the cases, I could get the members of each group to argue their side of the case within two-hour sessions, with some time being left for questions and for appraisal by me.

Because the participants were all subject to the rules of the competition, including the limitations on the number of pages, a degree of evenhandedness was introduced in the grading which did not exist when research papers were required. On the other hand, the use of the moot court cases introduces a new variable because the cases differ in degrees and kinds of difficulty. In some cases, for example, the facts are complicated but the legal issues quite traditional, which means a wealth of authorities is available and the main challenge in writing the briefs is to compress the arguments. In other cases, the facts are relatively simple but the issues novel,

¹ Collins, *The Use of Jessup International Law Moot Court Cases in Political Science Departments*, 70 AJIL 809 (1976).

² Jessup materials are made available at nominal cost. For information write: Association of Student International Law Societies, 2223 Massachusetts Ave. N.W., Washington, D.C. 20008.

so there are not many authorities available and much of the challenge lies in ingenuity of reasoning.

I certainly intend to use the cases again and thought the Society, as well as Judge Jessup, might be interested in hearing of the uses to which they have been put in at least this law school.

JOSEPH MODESTE SWEENEY
Tulane Law School

TO THE EDITOR-IN-CHIEF

February 14, 1977

I would like to respond to the letter of Mr. Perry Pickert who commented on my article in the July 1976 issue of the *Journal*.¹ Referring to Article 26 of the Treaty of Peace with Japan of September 8, 1951,² he asserted that "even today, Japan lives under the threat of a unilateral unconditional most-favored-nation clause."³ Such an assertion is quite misleading and stands in the way of a proper understanding of the problem I tried to describe, for it ignores the actual situation of Japan under the Peace Treaty.

First, while I spoke of the "historical significance" of the unilateral clause as the typical pattern of treaty provision concluded in certain relationships between states until the 19th century, I never stated, and had no intention of implying, that such a clause is nonexistent today. Such an implication is contradicted by the remainder of my article. I am fully aware that similar clauses still exist under exceptional circumstances (such as navigation provisions in a treaty concluded with a landlocked state and certain peace-settlement provisions imposed upon the defeated in peace treaties). However, these examples cannot legitimately be construed as the typical treaty practice, the characteristics of which I described in the first paragraph of my article and footnotes 1 to 3.

Moreover, it should be noted that the second sentence of Article 26 of the Peace Treaty quoted by Mr. Pickert has substantially lost its operative effect since the conclusion of the Joint Declaration with the Soviet Union of October 19, 1956⁴ and the Joint Communiqué with the People's Republic of China of September 29, 1975⁵ (which replaced the Treaty of Peace with the Republic of China of April 28, 1952⁶), in both of which peace has been restored and war claims have been waived, even though they are not peace treaties in form. In other words, the said provision now, bears no practical significance and the application thereof is realistically inconceivable. After a dozen decades since Commodore Perry, it seems obvious that the change in the international environment has been so fundamental that one cannot compare that era with the present simply by pointing out the formal existence of a similar treaty provision.

SHINYA MURASE

TO THE EDITOR-IN-CHIEF

April 26, 1977

The piercing eye and pointed pen of the very erudite Prof. Julius Stone could find nothing useful in the consensus definition of aggression.¹ His criticism of the defects and deficiencies are well taken but at the risk of

¹ *The Most-Favored-Nation Treatment in Japan's Treaty Practice During the Period 1854-1905*, 70 AJIL 273 (1976).

² 3 UST 3169, TIAS No. 2490, 136 UNTS 45, at 75.

³ 70 AJIL 816 (1976).

⁴ 263 UNTS 99.

⁵ 17 THE JAPANESE ANNUAL OF INTERNATIONAL LAW 81 (1973).

⁶ 138 UNTS 3.

¹ *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AJIL 224 (1977).

merely confirming his impression that I am a dreamer may I respectfully invite consideration to some positive aspects of the UN action.

The primary significance of the definition, which admittedly is vague and unenforceable, is that it symbolizes and encourages a determination and a direction which is persistent and irreversible. No matter how slow or erratic the progress may be there is an unmistakable and an unrelenting striving for a peaceful society in which aggression is controlled through collective action of the international community. The definition demonstrates that even career diplomats, who were bound to consider above all else the interests of their own homeland, were unable to disregard the more pervasive universal demand for change. As the old order gives way to the new, the machinery of accommodation is bound to contain imperfections. That is hardly cause for unbridled denunciation or despair.

Over 25 years ago the United Nations declared that it would not resume work on a Code of Offenses Against the Peace and Security of Mankind or an International Criminal Court until aggression was defined. That obstacle has been removed and the attainment of a goal which Prof. Stone shares has become more feasible.²

Surely the learned professor, for whom I have the highest regard, does not wish to be considered either a scoffer or a cynic but only a realist. What he views as my "optimism which verges sometimes on wishfulness"³ is merely a reflection of my determination that, no matter how tortuous may be the road, realism should never be so barbed as to discourage us, or those who come after us, from striving for the fulfillment of "scholarly dreams."⁴

BENJAMIN B. FERENCZ

TO THE EDITOR-IN-CHIEF

January 24, 1977

In his otherwise excellent analysis of recent events in the Western Sahara,¹ Thomas Franck disapprovingly asserts that the U.S. support for the Moroccan-Mauritanian position of historic title "can only be understood as an act of political expediency." Approvingly, he adds that "[a]mong African states . . . a considerable number voted on principle rather than politics"² when they supported self-determination for the territory's indigenous population.

It should be clear, however, that the principle these African states supported *was* politics and political expediency. As Professor Franck himself points out, "African states have insisted that each colony, in the final stage of decolonization, must exercise its 'right' of self-determination within the confines of established boundaries."³ To advocate otherwise, of course, would be to sanction and even invite the political dismemberment of virtually every independent African state.

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² See STONE & WETZEL (eds.), *TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT* (1970); reviewed in 66 AJIL 214 (1972).

³ *Supra* note 1, at 242. See also 70 AJIL 850.

⁴ See *supra* note 1, at 241.

¹ *The Stealing of the Sahara*, 70 AJIL 694-721 (1976).

² *Id.* 718.

³ *Id.* 698.

TO THE EDITOR-IN-CHIEF

March 27, 1977

Professor Murphy, in his letter to the Editor-in-Chief, published in the January 1977 issue of the *Journal*, has argued against the position taken by Professor Gross about the illegality of the PLO's participation in the UN Security Council's deliberations.¹

I find fault with Professor Murphy's criticism on two grounds. In the first place, I do not believe he meant to say that Israel has refused "to recognize the Palestinians." He, like me, was undoubtedly constrained by the format of a letter and was unable to be as explicit as possible. But from the argument as published, two inferences may be drawn: (1) Israel has refused to accept the concept of a Palestinian nationality or (2) Israel has refused to recognize the PLO. Statements have indeed been issued, formally and informally, regarding the existence of a Palestinian people or nation, and Israeli officials have formally announced a policy of rejection of the authority of the PLO to represent the Palestinian interests in any political settlement that may take place among the parties to the conflict. Second, while one may agree with Professor Murphy's statements that "all parties in interest should be brought before [Courts of Equity] in order that a matter in controversy may be finally settled," and that "the Middle East controversy is not solvable without a representative of the interests of the Palestinian people,"² it is fallacious to accept the PLO as the *only* representative, now or at the time that organization was invited to speak before the Council. The source of the representative authority of the PLO within the Occupied Territories has been indirect—the election of local officials who support the PLO. It is also too early to write off the Jordanian Government as a possible representative of the Palestinians.

I am greatly concerned about the PLO's participation in the United Nations because of the significance of the precedents set.³ The PLO represents no state, government, government-in-exile, or even demarcated territory; it is a nonstate political representative at best, seeking a negotiating status equal to that of a state.

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TO THE EDITOR-IN-CHIEF

April 8, 1977

Max Tardu's comparative analysis of "Co-Existing" human rights petition procedures within the UN and regional OAS legal systems provides useful insight into possible areas of conflict between the two systems and approaches to solution.¹ Within his commentary one can also glean awareness of an ultimate clash between: (1) the interests of certain states and organizations in "unification,"² "a minimum of juridical order,"³ "res judicata,"⁴ and a hierarchic stability or control, and (2) the interests of individuals in obtaining effective remedies to human right deprivations imposed upon them by control-oriented state actors or private groups and individuals who, for one reason or another, are insufficiently restrained by state actors and domestic legal systems.

¹ Gross, *Voting in the Security Council and the PLO*, 60 AJIL 470 (1976).

² Stated earlier by Professor Murphy in a slightly different context in *The Middle East*, 44 ST. JOHN'S L. REV. 390, 396 (1970).

³ See Silverburg, *The Palestine Liberation Organization in the United Nations: Implications for International Law and Relations*, ISRAEL L. REV. (forthcoming).

¹ 70 AJIL 778 (1976).

² See *id.* at 793.

³ See *id.* at 795.

⁴ See *id.* at 786 and 799.

As if to intensify the clash, Tardu argues the need for "balance" between "order" and "repetitive complaints"⁵ and the "excessive freedom"⁶ of individuals to seek redress for violations of their human rights. To pose such a dichotomy seems to demonstrate a bias which actually favors violator states and an order not of law and authority but of state-oriented stability and control, especially in an era when deprivations of human rights and human dignity are widespread. At a minimum it underlies the potential clash between state-dominated structures and the complaining individual—a clash that underscores the serious problems inherent in any present international effort to implement human rights.⁷

My own preference is to open more widely the avenues to effective implementation of human rights, however repetitious, until they *are* effective. Beyond this apparent difference in preference, however, it is necessary to address an apparent difference in interpretation of the law (*ferenda, lata, or opinio juris*) concerning recognition of "res judicata" in cases where state or regional entities apply international law. Mr. Tardu argues that "international responsibility of states under customary law and several conventions may be involved if they violate the rule of res judicata,"⁸ and "res judicata may possibly be regarded as a universally accepted principle of law."⁹ Although his thoughts are not fully developed and no authority for the transnational "rule" of res judicata exists in his commentary, it is important to stress a counterpoint—that decisions of one state entity applying international law are *not* "binding" on another state, regional organization, or international entity.

To assume the existence of a world juridic order that could form an adequate basis for the adoption of a principle of transnational res judicata when such "a minimum of juridical order" does not exist and when human right deprivations are far too numerous and widespread would beg a fundamental question in a way that, as Mr. Tardu seems to recognize, could result in a cruel irony for the complaining individual.¹⁰ Just as long as there is no effective global governmental system there should be no state or regional act which precludes further action by the international community directed toward the application of international law. International legal norms have a common or universal character and value content; they cannot be thwarted by the actions of one state alone¹¹ or, by analogy, one region. To illustrate the counterpoint further, it is useful to recall that, in the case of international criminal activity, no state has the authority to grant immunity and there is no recognition of double jeopardy¹² so as to allow an escape of criminal sanction.

No authority to grant immunity for international crime exists and such would be inconsistent with the fact that universal crimes are crimes against

⁵ See *id.* at 795.

⁶ *Ibid.*

⁷ Such a recognition is commonplace; see, e.g. W. Korey, *The Key to Human Rights—Implementation* (CEIP pam. No. 570, 1968); J. CAREY, *UN PROTECTION OF CIVIL AND POLITICAL RIGHTS* (1970); and J. Paust, *An International Structure for Implementation of the 1949 Geneva Conventions: Needs and Function Analysis*, 1 YALE STUDIES IN WORLD PUB. ORDER 148 (1974).

⁸ Tardu, *supra* note 1, at 799.

⁹ *Id.* at 786. See also *id.* concerning double jeopardy.

¹⁰ See *id.* at 794 (the tortured political prisoner).

¹¹ See, e.g. *The Paquete Habana*, 175 U.S. 677, 711 (1900), quoting Justice Strong, *The Scotia*, 81 U.S. (14 Wall.) 170, 187–88 (1871). See also 11 OPS. ATTY. GEN. 297, 299–300 (1865).

¹² Cf. Tardu, *supra* note 1, at 786.

humankind, not merely against a particular state or region,¹³ and that implementation of sanctions should ultimately be governed by universal standards. There are many evidences of the principle that domestic laws or juridical acts cannot dissipate international criminal responsibility. For example, the Allied Control Law No. 10 (January 31, 1946) provided in Article II.5 that no statute of limitation, pardon, grant of immunity, or amnesty under the Nazi regime would be admitted as a bar to trial or punishment.¹⁴ More recently the UN General Assembly stated that no statutory limitation would apply to war crimes, crimes against humanity, or genocide.¹⁵ The General Assembly has also recognized the expectation that "States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity."¹⁶

The Principles of the Nuremberg Charter and Judgment recognized that governmental orders cannot free a person from criminal responsibility (so governmental acts could hardly do the same) and that even though domestic law "does not impose a penalty for an act which constitutes a crime under international law, it does not relieve the person who committed the act from responsibility under international law."¹⁷ In 1919 the Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties took note of the rule that "no trial or sentence by a court of the enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the Allied or Associated States."¹⁸ An example of the same reasoning can be found in the French case of *Abetz*,¹⁹ where it was held that diplomatic immunity was not relevant to a war crimes prosecution since the legal basis of prosecution rests with offenses against the community of nations and as such any domestic interference through grants of immunity would "subordinate the prosecution to the authorization of the country to which the guilty person belongs."

A local grant of immunity could well be no more in conformity with

¹³ See also UN Secretary-General Report, *Respect for Human Rights in Armed Conflict*, 24 GAOR, UN Doc. A/7720 (1969), stating that these are obligations owing to humankind rather than parties to a particular conflict; 4 PICTET, COMMENTARY, GENEVA CONVENTIONS RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 15-61, 587, 592, 593 (1958); Q. Wright, *The Law of the Nuremberg Trial*, 41 AJIL 38, 59 n. 74 (1947).

¹⁴ See 15 TRIALS OF THE WAR CRIMINALS 25 (1949).

¹⁵ G.A. Res. 2391 adopting the Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity, Art. 1, 23 GAOR, Supp. (No. 18) 40, UN Doc. A/7218 (1968) (vote: 58-7-36; against were United States, United Kingdom, South Africa, Portugal, Honduras, El Salvador, Australia). See also HUDSON, INTERNATIONAL TRIBUNALS 85 (1944), stating: "No statute of limitations exists in international law to bar the presentation of disputes or claims . . ."; G.A. Res. 2840, 26 GAOR, Supp. (No. 29) 88, UN Doc. A/8429 (1971); G.A. Res. 3074, 28 GAOR, Supp. (No. 30) 78, UN Doc. A/9030 (1973).

¹⁶ G.A. Res. 3074, *supra* note 15 (vote: 94-0-29):

¹⁷ Principles II and IV, Principles of the Nuremberg Charter and Judgment, [1950] 2 Y.B. INT. LAW COMM. 374, UN Doc. A/1316 (1950); adopted by G.A. Res. 488, 5 GAOR, Supp. (No. 20) 77, UN Doc. A/1775 (1950).

¹⁸ Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties 9 (1919). Members were: the United States, British Empire, France, Italy, Japan, Belgium, Greece, Poland, Romania, Serbia.

¹⁹ 46 AJIL 161, 162 (1952) (French Cour de Cassation, 1950). See also 3 MANUAL OF MILITARY LAW, *The Law of War on Land*, 95, n. 2 (British War Office 1958), stating that no refuge is possible in a state which is bound by the Conventions and that a state cannot exonerate itself or others for violations.

community expectations than a refusal to prosecute for some other reason. A more serious problem would involve "fake" prosecutions which were designed to result in lesser crime convictions or in an acquittal where it is known that more serious charges could not be proven but the decision is made to prosecute unprovable higher offenses so that the defendant ultimately avoids conviction for the commission of other offenses. Furthermore, a refusal to prosecute can be a violation of the international obligations under the 1949 Geneva Conventions (1) to bring to trial *all* persons alleged to have committed or ordered to be committed "grave breaches" of the Conventions, (2) to take such measures necessary for the suppression of all acts contrary to the provisions of the Convention other than grave breaches, and (3) to *respect* and to *ensure* respect for the Conventions in all circumstances. In supplementation of the principle that domestic laws and governmental acts cannot dissipate international criminal responsibility and the concomitant obligation of the states to prosecute violations of the laws of war²⁰ is the recent UN General Assembly declaration that "States shall not take any legislative or other measures" that thwart obligations to detect, arrest and prosecute, or extradite persons accused of war crimes and crimes against humanity.²¹ Also supplementing these principles and obligations is the prohibition in the Geneva Convention of state grants of waiver or immunity with respect to "any liability incurred" by itself or any other state."²²

Additionally, there is no acceptance of double jeopardy, a common law notion, as a bar to international sanction against international crime for many of the same reasons that apply to attempts to grant immunity.²³ However, there is recognition of the right to avoid double jeopardy with respect to domestic penal violations;²⁴ but, as Mr. Tardu states, this right applies to double jeopardy "before municipal courts"²⁵ and apparently only with regard to domestic crime.

Finally, I agree that there is a "need for a systematic and thorough review of *all* problems of competing international procedures" (emphasis added), including the impact of domestic actions.

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²⁰ See, e.g. U.S. DEP'T. OF ARMY, LAW OF LAND WARFARE, para. 506(b) (Field Manual 27-10, 1956); U.S. DEP'T. OF NAVY, LAW OF NAVAL WARFARE, para. 330(a) (Change 2) (1955). See also *Republica v. DeLongchamps*, 1 U.S. (1 Dall.) 111, 116 (1784); *Henfield's Case*, 11 F. Cas. 1099, 1107-1108 (No. 6, 360) (CCD Pa. 1793); 2 GROTIUS, DE JURE BELLI AC PACIS 253 (CEIP ed., Kelsey trans. 1925); E. DE Vattel, LE DROIT DES GENS, OU PRINCIPLES DE LA LOI NATURELLE 163 (CEIP ed., Fenwick trans. 1916); and 4 PICTET, *supra* note 13, at 602 ("absolute" obligation).

²¹ G.A. Res. 3074, *supra* note 15.

²² See, e.g., Art. 131, Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949 (1956) 6 UST 3316, 75 UNTS 135 [hereinafter cited as GPW].

²³ See, e.g., *Commission Report*, *supra* note 18, at 9, stating, "but no trial or sentence by a court of an enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the Allied or Associated States." See also Art. 86, GPW, which does not allow double *punishment* of a prisoner of war for the same act or offense. This does not necessarily preclude double jeopardy, and the provision is not one of the enumerated procedural guarantees for a "grave breach" prosecution. See, e.g., Art. 129, GPW.

²⁴ See 1966 Covenant on Civil and Political Rights, Art. 14 (7), in 61 AJIL 861 (1967). No provision of a similar nature appears in the 1948 Universal Declaration of Human Rights, the 1950 European Convention on Human Rights, or the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

²⁵ See Tardu, *supra* note 1, at 786.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

John A. Boyd *

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

PASSPORTS AND OTHER TRAVEL DOCUMENTS (U.S. *Digest*, Ch. 3, §2)

During his March 9, 1977, news conference, President Carter announced the removal of travel restrictions on American citizens traveling abroad:

I have long been concerned about our own Nation's stance in prohibiting American citizens to travel to foreign countries. We also are quite eagerly assessing our own Nation's policies that violate human rights as defined by the Helsinki agreement.

... So I've instructed the Secretary of State to remove any travel restrictions on American citizens who want to go to Vietnam, to North Korea, to Cuba, and to Cambodia. And these restrictions will be lifted as of the 18th day of March.

I would like to point out that we still don't have diplomatic relationships with these countries. That's a doubtful prospect at this time. So there will be some necessary precautions that ought to be taken by citizens who go there, since we don't have our own diplomats in those countries to protect them if they should have difficulty.¹

A Department of State telegram to all diplomatic and consular posts sent on March 18, 1977, outlined U.S. policy concerning visas, dual citizenship, travel documentation, and other matters for U.S. citizens traveling to North Korea, Cambodia, Vietnam, or Cuba. With regard to obtaining visas to the first three of these countries, the telegram indicated that any application for visas may be directed to any embassy in a foreign country with which Vietnam, North Korea, or Cambodia, as appropriate, maintains diplomatic relations. The decision to issue or not to issue a visa is made only by the country to be visited. The United States may not interfere in the visa matters of these countries, and it is therefore the responsibility of the traveler to obtain such visas.

The telegram pointed out that, although the United States rejects the concept of dual nationality as a matter of policy, it does accept its existence in individual cases as a matter of fact resulting from the conflicting laws of other countries which cannot be controlled by the United States. U.S. citizens who may also be nationals of North Korea, Cambodia, or Vietnam

* Office of the Legal Adviser, Department of State.

¹ 13 WEEKLY COMP. OF PRES. DOC. 328-29 (Mar. 9, 1977).

may be deemed to owe primary allegiance to the country of their nationality in which they travel or reside. Therefore, if a U.S. citizen who also is a national of North Korea, Cambodia, or Vietnam encounters difficulties while traveling or residing in one of these countries, the U.S. Government may not be able to make effective representations on his or her behalf.

Dual national U.S. citizens who may be eligible for military service in the country of their other nationality now or in the future could possibly be called into that country's military service while traveling there or may be detained or prevented from leaving that country until they are eligible for that service. Such persons and dual nationals who acquired U.S. nationality and also a foreign nationality at birth should communicate with the Legal Division of the Passport Office of the Department of State at 1425 K Street, N.W., Washington, D.C., 20524, before their departure.

Concerning travel documentation, the Department of State telegram indicated that a U.S. citizen who was born in North Korea, Cambodia, or Vietnam should be aware of the possibility that he may be considered a national of the country where he was born. U.S. citizens should travel to any of these three countries only on their U.S. passports with a visa of the host country affixed to it, and under no conditions should U.S. citizens accept any travel documentation which identifies them as citizens of the host country.

Finally, the telegram noted that under 8 U.S.C. 1185 and title 22 of the *Code of Federal Regulations* at section 53.1, it is unlawful, except as otherwise provided in section 53.2 of the *Code of Federal Regulations*, for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States without a valid passport.

The Department of State's advisory for American citizens traveling to Cuba read as follows:

GENERAL

. . . U.S. citizen visitors to Cuba should register with the Swiss Embassy on arrival in Cuba at: Foreign Interests Section of the Embassy of Switzerland, Calle M (between General Maceo and Calzada), Vedado, La Habana (telephone: 32-05-51 or 32-04-43). In the absence of relations, the U.S. Government is not in a position to provide the same level of consular protection in Cuba as it does in other countries where it has diplomatic and consular presence. Americans in Cuba should comply fully with local laws in order to avoid consular problems.

TRAVEL ARRANGEMENTS

(A) Information

The Embassy of the Czechoslovak Socialist Republic, 3900 Linnean Avenue, Washington, D.C. 20008, represents Cuban interests in the United States in the absence of direct diplomatic and consular relations between the United States and Cuba. The Cuban Interests Section of the Embassy, and Cuban embassies or consulates in other

countries can provide detailed information on current Cuban immigration, customs and other regulations applicable to visitors. American travelers should consult one of those offices in the early stages of planning any trip to Cuba.

(B) Visas

U.S. citizens are requested to obtain visas before entering Cuba. Visa applications may be made to the Embassy of Czechoslovakia in Washington and Cuban embassies and consulates in other countries. Applications made in Washington are normally submitted to Havana for approval, a process which could take several weeks. To avoid delays enroute, American travelers should have their visas before leaving the United States for Cuba.

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TRAVEL DOCUMENTATION

While the U.S. Government strongly disapproves of the obtention and use of foreign passports by U.S. citizens, the necessity for the use of such passports is accepted under certain circumstances. It is our understanding that Cuban authorities will require a person possessing both Cuban and U.S. nationality to obtain a Cuban passport for entry into or departure from Cuba even though the person may possess a U.S. passport. The obtention and use of a Cuban passport under these precise circumstances would not jeopardize an individual's U.S. citizenship.²

The instructions drew attention to the provisions of 8 U.S.C. 1185, 22 CFR 53.1,³ but noted the exception under section 53.2(B) whereby U.S. citizens may travel anywhere in the Western Hemisphere area. U.S. passports must be secured if any foreign country in the Western Hemisphere requires them for entry therein.

The comments of the Department of State concerning dual citizenship with Cuba repeated the instructions summarized above concerning North Korea, Cambodia and Vietnam.⁴

PROTECTION OF HUMAN RIGHTS

(U.S. *Digest*, Ch. 3, §6)

Soviet Union

On January 27, 1977, the Department of State Office of Press Relations issued the following statement concerning Andrey Sakharov:

We have long admired Andrey Sakharov as an outspoken champion of human rights in the Soviet Union. He is, as you know, a prominent, respected scientist, a Nobel laureate, who, at considerable risk, has worked to promote respect for human rights in his native land.

Any attempts by the Soviet authorities to intimidate Mr. Sakharov will not silence legitimate criticism in the Soviet Union and will con-

² For the full text of the instructions, see Dept. of State telegram No. 61083 to all diplomatic and consular posts, Mar. 18, 1977.

³ *Supra* p. 513.

⁴ *Supra* pp. 512-13.

flict with accepted international standards in the field of human rights.¹

In his press conference of January 31, 1977, Secretary of State Vance responded to a question concerning international civil rights and Mr. Sakharov as follows:

On the issue of human rights, the President has often expressed his deep concern in this area and has reaffirmed that deep concern in the inauguration address.

We will speak frankly about injustice both at home and abroad. We do not intend, however, to be strident or polemical, but we do believe that an abiding respect for human rights is a human value of fundamental importance and that it must be nourished. We will not comment on each and every issue, but we will from time to time comment when we see a threat to human rights, when we believe it constructive to do so.²

In answer to a question during Secretary Vance's press conference of January 31, 1977, which indicated that President Carter had not cleared the U.S. statement concerning Mr. Sakharov and which asked who had cleared it prior to its issuance, Secretary Vance stated:

Let me say I did not see it; it was cleared at lower levels. I am not going to give the name of the individual. I have the responsibility in this Department, and therefore I accept that responsibility fully. Let me say that I respect Mr. Sakharov very deeply; I respect his, Mr. Sakharov's, principles and his pursuit of those principles.³

On February 7, 1977, the Director of the Office of Press Relations for the Department of State, Frederick Z. Brown, read the following statement concerning the reported arrest in Moscow by Soviet authorities in Moscow of Aleksandr Ginzburg on February 4, 1977:

We are watching with concern the treatment of Aleksandr Ginzburg and we have made the Soviet Government aware of our feeling. Wherever it may occur, the harassment of individuals who are pursuing the principles set forth in the Universal Declaration of Human Rights, or who are working for the implementation of the Final Act of the Helsinki Conference, is a matter of profound concern for all Americans.⁴

During his press conference of February 8, 1977, President Carter responded in pertinent part as follows to a question concerning the arrest of poet Aleksandr Ginzburg and the observance of human rights in the Soviet Union:

Well, this brings up the question that is referred to as linkage. I think we come out better in dealing with the Soviet Union if I am consistently and completely dedicated to the enhancement of human rights, not only as it deals with the Soviet Union but all other countries. I think this can legitimately be severed from our inclination to work

¹ 76 DEPT. STATE BULL. 138 n. 3. (1977).

² *Id.* 138.

³ *Id.* 141.

⁴ Dept. of State News Briefing, DPC 22, Feb. 7, 1977.

with the Soviet Union, for instance, in reducing dependence upon atomic weapons and also in seeking mutual and balanced force reductions in Europe.

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. . . I think it ought to be clear, and I have made clear directly in communication to Mr. Brezhnev and in my meeting with Ambassador Dobrynin, that I was reserving the right to speak out strong and forcefully whenever human rights are threatened, not every instance, but when I think it is advisable. This is not intended as a public relations attack on the Soviet Union, and I would hope that their leaders could recognize the American people's deep concern about human rights.

I think in many other countries of the world there has been some progress. I think in the Soviet Union there has already been some progress. The number of Jews, for instance, who have been permitted to emigrate from the Soviet Union in the last few months has increased.⁵

On February 4, 1977, Associated Press reporter George A. Krinsky was expelled from the Soviet Union. The U.S. Senate report (No. 95-35) in support of Senate Resolution 81 concerning the expulsion of Mr. Krinsky, as introduced into the *Congressional Record* by Majority Leader Robert C. Byrd, describes the events surrounding the expulsion in these terms:

On February 4, 1977, the Soviet Government expelled from the Soviet Union Associated Press reporter George A. Krinsky, alleging that Mr. Krinsky had been engaged in espionage and currency violations. On the same day Secretary of State Vance, having consulted with President Carter and National Security Advisor Brzezinski, summoned Soviet Ambassador Dobrynin to the State Department where, according to press reports, he requested that the expulsion order be rescinded, and made it known that the United States regarded the Soviet action as unacceptable. The Soviet Government rejected the American appeal, whereupon, on February 5, the U.S. Government ordered the retaliatory expulsion of Tass correspondent Vladimir I. Alekseyev.⁶

On February 17, 1977, the *New York Times* reported that President Carter had responded on February 5, 1977, to a letter from Professor Andry D. Sakharov:

Human rights is a central concern of my administration. In my inaugural address I stated: "Because we are free, we can never be indifferent to the fate of freedom elsewhere."—You may rest assured that the American people and our Government will continue our firm commitment to promote respect for human rights not only in our country but also abroad.

We shall use our good offices to seek the release of prisoners of conscience, and we will continue our efforts to shape a world responsive to human aspirations in which nationals of differing cultures and histories can live side by side in peace and justice.⁷

⁵ 13 WEEKLY COMP. OF PRES. DOC. 160 (Feb. 14, 1977).

⁶ 123 CONG. REC. S3460 (daily ed. Mar. 4, 1977).

⁷ N.Y. Times, Feb. 17, 1977, at 3.

In response to a question concerning his letter to Mr. Sakharov during his press conference of February 23, 1977, President Carter noted the responsibility the United States bears to express disapproval of violations of human rights throughout the world:

We have, I think, a responsibility and a legal right to express our disapproval of violations of human rights. The Helsinki agreement, so-called Basket III provision, insures that some of these human rights shall be preserved. We are signatory to the Helsinki agreement. We are, ourselves, culpable in some ways for not giving people adequate right to move around our country, or restricting unnecessarily in my opinion visitation to this country by those who disagree with us politically.

So I think we all ought to take a position in our country and among our friends and allies, among our potential adversaries that human rights is something on which we should bear a major responsibility for leadership. And I have made it clear to the Soviet Union and to others in the Eastern European Community that I am not trying to launch a unilateral criticism of them; that I am trying to set a standard in our own country and make my concerns expressed throughout the world and not singled out against any particular country.⁸

The *New York Times* reported on March 2, 1977, that President Carter met with Soviet dissident Vladimir I. Bukovsky at the White House on March 1. Mr. Bukovsky was in Washington to meet with members of the U.S. Congress after having been released from a Soviet prison in December of 1976 and flown to the West in exchange for the freeing of the Chilean Communist Party leader Luis Corvalan. The *New York Times* reported that President Carter told Mr. Bukovsky that his Administration's commitment to human rights was "permanent" and that "I don't intend to be timid in my public statements and positions."⁹

During his address to the General Assembly of the United Nations, President Carter spoke about human rights without making special reference to any particular country:

... All the signatories of the U.N. Charter have pledged themselves to observe and respect human rights. Thus, no member of the United Nations can claim that mistreatment of its citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation of freedom occurs in any part of the world.

.....

Strengthened international machinery will help us to close the gap between promise and performance in protecting human rights. When gross or widespread violation takes place—contrary to international commitments—it is of concern to all. The solemn commitments of the United Nations Charter, of the United Nations Universal Declaration for Human Rights, of the Helsinki Accords, and of many other international instruments must be taken just as seriously as commercial or security agreements.¹⁰

⁸ 13 WEEKLY COMP. OF PRES. DOC. 244, 245 (Feb. 28, 1977).

⁹ N.Y. Times, Mar. 2, 1977, at 1.

¹⁰ For full text, see 13 WEEKLEY COMP. OF PRES. DOC. 397-402 (Mar. 21, 1977).

On March 22, 1977, the *New York Times* reported that Leonid I. Brezhnev, General Secretary of the Central Committee of the Communist Party of the Soviet Union, gave an address in the Kremlin opening the 16th Congress of Trade Unions which contained the following statements concerning human rights:

In our country it is not forbidden to think differently from the majority. We regard the comrades who come out with well-founded criticism, who strive to help the cause, as critics in good faith, and we are grateful to them. Those who criticize erroneously we regard as erring people.

It is another matter when several persons who have broken away from our society actively come out against the socialist system, embark on the road of anti-Soviet activity, violate laws and, having no support inside the country, turn for support abroad, to imperialist subversive centers.

Our people demand that such so-called public figures be treated as opponents of socialism, as persons acting against their own motherland, as accomplices and sometimes agents of imperialism. Quite naturally we have taken and will take measures against them as envisaged by law.

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But there are circumstances directly opposed to further improvement of Soviet-American relations. One is the slanderous campaign about a mythical military menace posed by the U.S.S.R. I have already spoken on that matter. The other circumstance is the direct attempts by official American bodies to interfere in the internal affairs of the Soviet Union.

Washington's claims to teach others how to live, I believe, cannot be accepted by any sovereign state, not to mention the fact that neither the situation in the United States itself nor United States actions and policies in the world at large give justification to such claims.¹¹

International Terrorism

On January 26, 1977, the U.S. Senate passed by a vote of 93 in favor and none opposed Senate Resolution 48, entitled "A resolution with respect to the release of Abu Daoud," which reads as follows:

Resolved, That it is the sense of the Senate that the release of Abu Daoud, a known terrorist who is accused of planning the murder of Olympic athletes in Munich in 1972, is harmful to the efforts of the community of nations to stamp out international terrorism.

SEC. 2. It is further the sense of the Senate that United States should consult promptly with France and other friendly nations to seek ways to prevent a recurrence of a situation in which a terrorist leader is released from detention without facing pending criminal charges in a court of law.

SEC. 3. The Secretary of the Senate is directed to provide a copy of

¹¹ N.Y. Times Mar. 22, 1977, at 14.

this resolution to the Secretary of State for transmission to the Government of France.¹

During the debate on January 26, 1977, concerning the resolution, Senator Abraham A. Ribicoff inserted into the Record of the Senate an article printed in the January 15, 1977, edition of the *Economist*:

... Six days ahead of his scheduled hearing, he was summoned by the Paris appeals court on Tuesday morning [January 11, 1977] for an inquiry into his detention. First, the court disposed of an international arrest warrant which had been sent by the West German authorities as an initial ground for holding the prisoner. Since this had not been validated by extradition papers sent through formal diplomatic channels, the court suggested, it had no standing. It then quashed the Israeli case. France, the court said, could not handle a request involving a non-Israeli citizen suspected of committing a crime in West Germany in 1972. It was only in 1975 that France acquired a law permitting it to pursue such crimes. Almost without argument, Abu Daoud was set free to board a plane for Algiers.²

On January 11, the day of the release of Abu Daoud, John H. Trattner, Deputy Director of the Office of Press Relations, Department of State, when asked during the daily news briefing about the reported decision of the French court, stated:

... [O]ur reaction ... is one of dismay—dismay that through an apparent legal technicality neither West German nor Israeli courts will be given the opportunity to interrogate ... this man about the brutal and revolting murder of athletes in Munich. Our dismay reflects our abhorrence ... over the brutal and mindless murders at Munich ... and our strong conviction that terrorists should be dealt with sternly and firmly by the legal authorities of all countries.³

On the following day, January 12, Robert L. Funseth, Special Assistant to the Secretary of State for Press Relations and Spokesman of the Department of State, confirmed that Secretary Kissinger had described the action of the French Government as "outrageous."⁴

On January 13, 1977, the French Foreign Ministry issued the following press statement:

The Director of American Affairs called in this morning the Charge d'Affaires of the United States in Paris, Mr. Samuel Gammon, to tell him of the surprise of the French Government over the Declaration made January 11 by the spokesman of the State Department on the subject of the Abu Daoud affair.

It was indicated to the American Charge d'Affaires that this declaration constituted an inadmissible comment on the acts of French courts.⁵

On January 24, 1977, Representative Robert W. Edgar introduced into the Record of the House of Representatives a letter from the Ambassador

¹ 123 CONG. REC. S1535 (daily ed. Jan. 26, 1977).

² *Id.* S1534.

³ Dept. of State News Briefing, DPC 250, Jan. 11, 1977.

⁴ Dept. of State News Briefing, DPC 251, Jan. 12, 1977.

⁵ Dept. of State telegram 1171 from Paris to Washington, Jan. 13, 1977.

of France, Jacques Kosciusko-Morizet, which appeared in the January 23, 1977, edition of the *Washington Post*, replying to some criticisms of the French Government in the Abu Daoud matter:

Article 9 of the French-German extradition agreement stipulates that the judicial request for temporary arrest "must be confirmed, at the same time, through diplomatic channels." We proceeded to make the arrest, which is the first step in extradition proceedings.

Diplomatic confirmation was needed. . . .

In view of the importance and the urgency of the matter, the head of the Foreign Minister's staff drew the attention of the German Charge d'Affaires in Paris . . . to the problem so that he could immediately inform the Foreign Minister in Bonn. The German Ministry could thus, simply by sending a telegram, at any time of the day or night, confirm the request for the provisional arrest and its intention to request extradition. As you know very well, nothing was received from the Ministry of Foreign Affairs of the Federal German Republic. The judge was therefore bound by law and the court had no choice but to order the release of Abu Daoud.⁶

Privacy

On January 14, 1977, the Department of Justice released a report concerning mail-opening activities in the United States by the Central Intelligence Agency (CIA) and drawing certain distinctions between international and domestic mail.¹ The report discusses, *inter alia*, the development of Fourth Amendment law governing the use by the executive branch of surveillance that invades privacy. It concludes that, although some of the mail-opening activities conducted by the CIA from 1953 through 1973 would now be illegal, no prosecutions should be brought because the law concerning these activities has not always been clear and because of the difficulties of proof engendered by the lack of written documentation, lapse of time, and deaths of key participants. Described as a departure from normal Department practices, the report was issued to provide fair notice that any failure in the future to comply with these newly developed but now clearly enunciated standards will result in prosecution.

In a discussion of the possible grounds for prosecution premised upon a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures, the Department of Justice drew the following distinction between international and domestic mail:

The Supreme Court indicated long ago that sealed domestic mail may not be opened in the absence of a search warrant. This ruling was based upon the expectation of privacy enjoyed with respect to the contents of first-class mail; that privacy was guaranteed by statute, and courts held that other classes of mail could be opened without judicial authorization. Those who send or receive mail crossing the

⁶ 123 CONG. REC. E305 (daily ed. Jan. 24, 1977).

¹ Report of the Department of Justice Concerning Its Investigation and Prosecutorial Decisions with Respect to Central Intelligence Agency Mail Opening Activities in the United States. Dept. of Justice news release, Jan. 14, 1977.

border of the United States do not enjoy the same expectation of privacy as those sending or receiving domestic first-class mail. Customs Service officers are permitted by law to open all envelopes for necessary inspections. . . . The expectation of privacy in the contents of international mail therefore cannot easily be equated to the expectation of privacy in domestic mail. [Footnotes omitted.]

After a discussion of U.S. Supreme Court cases concerning wire interceptions, the Department of Justice outlined its position as follows:

Those courts which have decided the issue have upheld . . . [foreign] warrantless surveillance, and the Department of Justice has consistently taken the position in the courts, before congressional committees, and in public statements that the President or the Attorney General may authorize limited electronic surveillance of foreign powers or their agents for foreign intelligence purposes. [Footnote omitted.]

A retroactive application of newly enunciated Fourth Amendment principles to persons whose conduct took place before the principles were established could, of course, not deter like conduct; and it would be unfair to punish Federal employees for doing things which, as the law then appeared, were not illegal.

The Department of Justice report then considered the impact of changes in the law of border searches on the role of authorization and its legality in cases involving Fourth Amendment issues:

It has long been accepted that things crossing the border are governed by special rules allowing search. These constitutional rules do not allow the government to subject a person to legal disabilities on account of his lawful communications, but they allow Federal officers to open the mail without warrants to look for contraband and dutiable items, including pornography. These rules may affect the expectation of privacy surrounding international correspondence. Moreover, the international exchange of ideas, especially with citizens of potentially unfriendly powers, may be on a different footing from the domestic exchange of ideas. [Footnotes omitted.]

While concluding that some previous activities could not now be legally authorized by the President, the Department of Justice did suggest that certain types of warrantless surveillance of mail could legally be conducted.

. . . [T]he executive branch may exercise its constitutional authority to engage in certain forms of surveillance without the prior approval of the judicial branch only if it determines whether the facts justify the surveillance, renders a formal, written authorization, and places a time limitation upon the surveillance. The authorizing officer must act pursuant to an express, written delegation of presidential authority. . . .

The establishment of a program of surveillance could be justified only by the President's foreign affairs powers. But the existence of such powers does not validate every action taken in their name. There must in each case be a sufficient basis, measured in light of the private interests the surveillance invades, for believing that the surveillance is necessary to serve the important end that purportedly justifies it. It must, in other words, be reasonable in scope and duration, as "reasonable" has come to be defined by the courts in cases

involving wiretapping. No open-ended authorization . . . would be sufficient. The Department does not suggest that this means that there must be probable cause to believe that every letter sought to be opened under such an authority would contain foreign intelligence information, any more than there must be probable cause to believe that every telephone call that might be overheard during a wire interception for criminal investigative purposes will include a discussion of crime. But there must, at a minimum, be a determination that the facts justify the surveillance and that it is no more intrusive than is necessary to that end. [Footnote omitted.]

CONSULAR OFFICERS AND CONSULATES

Functions of Consuls (U.S. Digest, Ch. 4, §2)

Protection of Nationals

On March 14, 1977, Representative Dante B. Fascell introduced into the *Congressional Record* a letter dated March 4, 1977, which Secretary of State Cyrus Vance submitted to Speaker of the House Thomas P. O'Neill, concerning the achievement of full respect for the human rights of U.S. citizens detained in Mexico. This letter was in the form of a periodic report required by section 408(b)(2) of the International Security Assistance and Arms Export Control Act of 1976 (P.L. 94-329). Portions of the letter follow:

During the period from July 1, 1975 through January 15, 1977, over 1500 Americans were arrested in Mexico. A vast majority of that number were involved in minor offenses and the arrestees were released after only one or two days in jail and/or the payment of a fine. During this period, there were 58 cases of substantiated physical abuse at the time of arrest. In another 47 cases the evidence was not sufficient to reach a clear conclusion. There were also 17 cases wherein Americans were subjected to unscrupulous financial practices by attorneys who extracted large fees from the prisoner and/or his family for services which they then failed to provide and another 61 cases where the evidence of malpractice was not sufficient to reach a conclusion. In cases of substantiated abuse the Embassy at Mexico City and our consular posts throughout Mexico have made and continue to make protests to the Mexican authorities at both the local and federal levels. I should point out, however, that protests have not been made in those cases where the arrested American citizens specifically requested that no protest be made. The protests are normally made both orally and in writing to the appropriate local officials. In many instances, the cases are documented by constituent posts and forwarded to the Embassy at Mexico City so that protests can be lodged with the Mexican Foreign Ministry. In such cases, the Embassy sends a formal note of protest to the Ministry with a copy to the Mexican Attorney General. These notes include a description of the case, a sworn statement by both the prisoner and the consular officer where appropriate, and a request that a full investigation be made into the allegation of abuse. To date, the Embassy has not received satisfactory replies to the vast majority of such notes.

Timely notification to our consular officers of the arrest of an American in Mexico and subsequent early access to the arrestee con-

tinue to be major problems, which we have discussed repeatedly with officials of the Mexican Government at the highest levels. We have stressed in these discussions the importance the United States Government places on obtaining early notification of an arrest and subsequent prompt access to the detainee in accordance with the Vienna Convention on Consular Relations to which both of our countries are signatories. While we have succeeded in convincing the Mexican Federal Government of our position, practical results on the local level remain spotty and uneven. During the last eighteen months, there were some 269 cases where we did not consider notification of an arrest by police authorities as adequate.

In many cases the initial information on the arrest case came from outside sources such as friends or relatives rather than from local authorities. Once notification has been received, however, the gaining of consular access to the arrested American is usually no longer a problem. Conditions of communication and or transportation, however, can be an obstacle, particularly in the many cases where the arrest takes place several hundred miles from the nearest consular office. In these instances initial contact with the arrested citizen is made by telephone and a consular officer visits as soon thereafter as practical.

During the period covered by this report a new Mexican administration has assumed office and we have discussed the problem with newly installed officials. President Lopez Portillo is, of course, aware of the problem and, as you know, alluded to it in his address to the House of Representatives during his recent State Visit to Washington. We are hopeful that our continuing discussion of the plight of U.S. citizens arrested in Mexico with the new Mexican Government officials will lead to rapid improvement.¹

FISHERIES

General Regime (U.S. Digest, Ch. 7, §4)

Geographic Coordinates of Fishery Conservation Zone

On March 1, 1977, Mark B. Feldman, Deputy Legal Adviser of the Department of State, signed a notice, effective immediately upon publication, announcing the limits of the fishery conservation zone of the United States within which the United States will exercise its exclusive fishery management authority as provided for in the Fishery Conservation and Management Act of 1976,¹ pending the establishment of permanent maritime boundaries by mutual agreement. The pertinent part of the notice reads as follows:

FISHERY CONSERVATION ZONE

NOTICE OF LIMITS

The Fishery Conservation and Management Act of 1976 establishes a fishery conservation zone contiguous to the territorial sea of the

¹ 123 CONG. REC. H2056 (daily ed. Mar. 14, 1977).

² P.L. 94-265; 90 Stat. 311; 15 U.S.C. 1801 *et seq.*

United States, effective March 1, 1977, the outer boundary of which is a line drawn in such a manner that each point on it is 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

The Government of the United States of America has been, is, and will be, engaged in consultations and negotiations with the governments of neighboring countries concerning the delimitation of areas subject to the respective jurisdiction of the United States and of these countries.

The limits of the fishery conservation zone of the United States as set forth below are intended to be without prejudice to any negotiations with these countries or to any positions which may have been or may be adopted respecting the limits of maritime jurisdiction in such areas.

The body of the notice lists coordinates under the following headings: U.S. Atlantic Coast and Gulf of Mexico, U.S. Pacific Coast (Washington, Oregon, and California), Alaska, the Caribbean Sea, Central and Western Pacific.²

During the daily press conference of March 1, 1977, the Director of the Office of Press Relations of the Department of State, Frederick Z. Brown, indicated that the establishment of the fishery conservation zone creates maritime boundaries with Canada, Mexico, the Soviet Union, the Bahamas, Cuba, the Dominican Republic, the Netherlands Antilles, Venezuela, the British Virgin Islands, Tonga, Western Samoa, the Trust Territory of the Pacific Islands, and various islands in the Pacific Ocean which are under the jurisdiction of the United Kingdom or New Zealand. The limits of the fishery conservation zone were established on the basis of the principle of equidistance in those cases where the application of that principle produces an equitable limit. However, in the Gulf of Maine area between the United States and Canada and in the Blake Plateau area between the United States and the Bahamas, the Government of the United States was of the opinion that special circumstances required that the limits of the fishery conservation zone be set along lines which reflected those special circumstances. In the Chukchi and Bering Seas and the North Pacific Ocean, the limits of the fishery conservation zone follow the line established by the Convention of 1867 between the United States and Russia concerning the cession of Alaska³ where that line is within 200 nautical miles of the U.S. coast.

At the time of the announcement, the United States and Canada had basic differences of view concerning the limits of fishery jurisdiction in the area of the Gulf of Maine and the Beaufort Sea, while the United States and the Soviet Union shared the view that their fishery limits should follow the 1867 Convention line where it is within 200 nautical miles of the coast. The United States and Mexico had agreed on provisional maritime boundaries in the Gulf of Mexico and Pacific Ocean which will be used by the

² For the complete text, see 42 Fed. Reg. 12937-40 (1977), 16 ILM 418 (1977).

³ 15 Stat. 539; TS 301; 11 Bevans 1216.

United States as the limit of its fishery jurisdiction. As of March 1, 1977, neither the Bahamas nor Cuba had advised the United States regarding their positions on the limits of fishery jurisdiction.

In response to questions during the daily news briefing, David A. Colson of the Legal Adviser's Office indicated that the Trust Territory of the Pacific Islands, the area normally called Micronesia, is not included under the terms of the Fishery Conservation and Management Act pursuant to the request of the Congress of Micronesia and thus did not receive a 200-mile fishery conservation zone under the Act. Accordingly, the line defining the fishery conservation zone around the island of Guam is a line equidistant between Guam and those Micronesian islands which are within 400 nautical miles of Guam. Mr. Colson said that the primary reason for the Micronesian request to be excluded under the terms of the Fishery Conservation and Management Act was that the Act did not include jurisdiction over tuna, which is the major fishery resource in that area.⁴

Civil Procedures

On March 1, 1977, the National Oceanic and Atmospheric Administration of the Department of Commerce, acting through the Associate Director of the National Marine Fisheries Service (NMFS), Winfred H. Meibohm, published certain interim regulations applying as of that date to the enforcement of the Fishery Conservation and Management Act of 1976.¹ Set forth below are pertinent portions of the National Oceanic and Atmospheric Administration's interim regulations outlining the exclusive fishery management authority of the United States under the Act and setting forth Civil Procedures with regard to assessment, hearings and appeals, permits, and remission of forfeitures under the Act:

As of March 1, 1977, the Fishery Conservation and Management Act of 1976 (the Act), 16 U.S.C. 1801 (sometimes called the 200 mile limit fishing law), establishes the exclusive fishery management authority of the United States (1) over all fish (except certain species of tuna) within the Fishery Conservation Zone, the body of water adjoining the U.S. territorial sea and extending 200 miles from the coastline, and (2) over all anadromous species of fish (such as salmon) and Continental Shelf fishery resources (such as lobster and certain crabs) beyond the Fishery Conservation Zone.

As of March 1, no foreign vessel may fish within the Fishery Conservation Zone (or beyond the Zone for anadromous species or Continental Shelf resources of the United States) except in accordance with the terms of a permit issued by the United States under the Act. In addition, U.S. vessels fishing in the Zone (or beyond the Zone for anadromous or Continental Shelf resources) will as of March 1 be fishing in accordance with any fishery management plans which have been prepared by one of the eight Regional Fishery Management Councils created by the Act, after a Council's plan for a particular fishery is put into effect by regulations of the Secretary of Commerce

⁴ Dept. of State News Briefing, DPC 37, Mar. 1, 1977.

¹ P.L. 94-265; 90 Stat. 311; 16 U.S.C. 1801 *et. seq.*

published in the FEDERAL REGISTER. . . Regulations for domestic fishing will be published in 50 CFR Chapter VI from time to time as the Secretary approves individual fishery management plans. As is detailed in §621.1 and §621.2 below, the Act subjects violators to three types of penalties: (1) Warning citations issued by authorized enforcement officers; (2) civil penalties (administrative fines) assessed against the violator by the Department of Commerce (up to \$25,000 for each violation); and (3) criminal penalties imposed as to certain offenses by the federal courts, with maximum sentences of imprisonment for one year and a fine of \$100,000 for each offense. In addition, a fishing vessel used in the commission of an offense and any illegally caught fish are subject to forfeiture to the United States. Further, a permit issued to a fishing vessel which is involved in a violation may be revoked, suspended, or modified under certain conditions.

The regulations in this new Part 621 of Title 50 establish . . . rules and procedures . . . namely, the assessment of civil money penalties (Subparts B and C); sanctions against a fishing permit (Subpart D); and actions the Department of Commerce may take in some situations to lessen the effect of forfeiture of a fishing vessel or its catch of fish (Subpart E). The issuance of citations is addressed in joint regulations of the Department of Commerce and Coast Guard published in 50 CFR Part 620. (42 FR. 11839.)

Subpart A serves as an introduction. It contains, in addition to an explanation of the actions which Part 621 governs (summarized above), a statement of enforcement policy, a definitions section, and certain document filing rules which apply to all the other Subparts. Special notice should be taken of the definition of "Director," a term which is used throughout these regulations and which includes the designee of the Director, National Marine Fisheries Service. The Service Director does not intend personally to make every decision required by these regulations, but will delegate to his five Regional Directors major responsibilities to act for him on a day to day basis. This will allow decisions to be made not only in a more timely manner, but also at the local level where the circumstances of a violation may more readily be placed in proper perspective.

Subparts B and C govern the assessment of civil money penalties against a violator by NMFS: Subpart B controls when the right to a hearing is waived; and Subpart C details the hearing and appeal procedures to be followed in the event action under Subpart B does not result in conclusion of the case. Upon completion of the investigation of a violation deemed appropriate for civil penalty action (as opposed for example to referral to the U.S. Attorney for criminal prosecution), a Notice of Violation would be served on the violator (Respondent) to advise him of the circumstances on the alleged violation and the proposed penalty to be assessed against him (§621.21). Respondent would have 45 days to decide on a course of action: he could choose not to contest the charge by paying the proposed penalty or a compromise amount that might be offered in the violation notice; he could dispute the charge or argue that the proposed penalty is too harsh by sending a Petition for Relief under §621.22; or he could do nothing. After the 45 day period, NMFS would take into account any relief petition filed, once again review the case of light of statutory factors such as the history of any prior offenses by Respondent and his ability to pay the fine (§621.23), and serve a Notice of Assessment

of civil penalty on Respondent (§621.24). An additional time period is provided at this point for Respondent to react to the assessment notice, either by paying the assessed penalty or by requesting under §621.25 that the matter be referred for hearing. If Respondent did neither, the assessment would become final under §621.26 and be referred to the U.S. Attorney for collection by court order (§621.27).

.....

Subpart D, Permit Sanctions, describes the manner in which a permit issued under the Act to a fishing vessel may be revoked, suspended, or modified. Section 621.51 notes that the subpart applies to all types of foreign and domestic fishing vessel permits. Permit sanctions may be taken when a vessel is used to commit a violation of the Act or when a civil penalty or criminal fine relating to the vessel has not been paid (§621.52). The specific types of permit sanctions authorized are detailed in §621.53. The succeeding sections set forth the procedure to be followed by NMFS if it proposes to take action against a permit, including giving notice of the sanction to the permit holder (§621.54), convening a fact-finding hearing if the permit holder has not had a previous opportunity to present his case at a hearing (for example, during a civil penalty assessment under Subpart B and C) (§621.55), and making a final decision after a hearing (§621.56).

The final Subpart, Remission of Forfeitures, details the circumstances under which NMFS may entertain a Petition for Relief from Forfeiture. The Subpart gives effect to those provisions of section 310(c) of the Act which make applicable to forfeitures under the Act certain provisions of the Customs laws, particularly 19 U.S.C. 1604-1618. Special attention is invited to the statement in §621.61(b) that remission of a forfeiture (release of seized property upon compliance with specified conditions) is in the nature of executive clemency granted only when the purposes of the Act would be served. A Petition must be filed within 60 days of the seizure and contain a full showing of the reasons believed to justify the requested relief (§621.62). NMFS would then conduct an investigation, which might include the appointment of an examiner to hold a fact-finding hearing (§621.63). If the NMFS decision grants the requested relief, it will set out conditions for the property release, which may include payment of a specified sum of money and the requirement that the property be exported from the United States (§621.64). If the conditions had not been satisfied 60 days after the decision (or satisfactory arrangements for later compliance made), the relief granted would expire and NMFS would refer the matter to the appropriate U.S. Attorney for judicial forfeiture of the property (§621.65). Section 621.66 permits NMFS to release in limited circumstances part or all of the seized property before final decision on a petition, usually upon payment of the property's value, which will be held for later action by NMFS or a court.²

Schedule of Fees

On February 1, 1977, the National Oceanic and Atmospheric Administration issued a fee schedule for foreign vessels fishing for fishery resources subject to the jurisdiction of the United States. The Schedule of Fees,

² For complete text, see 42 Fed. Reg. 12026-32 (1977), 16 ILM 351 (1977).

Issued by Robert W. Schoning, Director of the National Marine Fisheries Service, establishes fees to be paid by the owner or operator of any foreign fishing vessel wishing to fish within the U.S. Fishery Conservation Zone or for anadromous species or continental shelf fishery resources over which the United States asserts jurisdiction under the Fishery Conservation and Management Act of 1976. The portions of the announcement dealing with the assessment of fees and other charges follow:

FEES SCHEDULE

The fees charged each foreign nation for fishing for fishery resources subject to the jurisdiction of the United States will be as follows:

1. *Permit Fee*—A fixed annual fee of \$1.00 per gross registered ton (GRT) will be charged for any vessel engaged in or attempting to engage in the catching, taking, or harvesting of fish.

(a) A fixed annual fee of \$0.50 per GRT will be charged for any vessel engaged in processing fish, but not catching, taking, or harvesting fish. There will be \$2,500 upper limit on this charge.

(b) A fixed annual fee of \$200 per vessel will be charged for any vessel engaged in aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing but not catching, taking, harvesting, or processing fish.

If a vessel participates in more than one of the above activities, the highest applicable fee will be charged.

2. *Poundage Fee*—For 1977, a poundage fee of 3.5 percent of the 1975 ex-vessel price of the fish will be charged on all fish allocated to each nation, including the bycatch when applicable. The 1975 dock-side prices for computing fees were obtained from "Fisheries of the United States, 1975," except where noted.

Species:	Average Ex-vessel Value (per metric ton)
Armorheads, Pelagic	\$614
Butterfish	302
Cod, Pacific	251
Crab, Tanner	441
Flounders, Pacific (except Halibut)	318
Hake, Pacific	34
Hake, Red	156
Hake, Silver	194
Herring, Atlantic	73
Herring, Pacific	161
Mackeral, (<i>sic</i>) Atka	130
Mackerel, Atlantic	255
Mackerel, Jack	93
Other fin fish, Atlantic	328
Other ground fish, Pacific	45
Pollock, Alaska	98
Rockfish, Pacific	350
Sablefish	372
Snails (meats)	600
Squid, Atlantic	419
Squid, Pacific	82

The poundage fee may be recomputed at the end of the year on the basis of actual catch data. If the catch is substantially lower than the allocation, a refund may be applied for, as described later.

OTHER CHARGES

Foreign nations will be required to reimburse the United States for the total costs of placing observers aboard foreign fishing vessels. All costs associated with the program, including salary, per diem, and transportation of observers, as well as overhead costs, will be included in the determination of this fee. Payment of observer costs will be made upon billing at the end of the calendar year. Procedures and charges for the observers will be announced in the future.¹

CLAIMS SETTLEMENT AGREEMENTS

U.S.-Hungary (U.S. Digest, Ch. 9, §3)

Subsequent to the signing of the agreement regarding the settlement of claims between the United States and Hungary on March 6, 1973,¹ the National Bank of Hungary began canceling all foreign interest bank accounts owned by all residents of the United States on the grounds that claims based upon such accounts were settled by the agreement.²

The key language in the 1973 agreement bearing on the settlement of claims reads as follows:

Article 1

(1) The Government of the Hungarian People's Republic agrees to pay, and the Government of the United States agrees to accept, the lump sum of \$18,900,000 (eighteen million nine hundred thousand dollars) in United States currency in full and final settlement and in discharge of all claims of the Government and nationals of the United States against the Government and nationals of the Hungarian People's Republic which are described in this Agreement.

(2) Such payment shall be made by the Government of the Hungarian People's Republic as provided in Article 4 of this Agreement.

Article 2

The claims which are referred to in Article 1, and which are being settled and discharged by this Agreement, are claims of nationals and the Government of the United States for:

(1) property, rights and interests affected by Hungarian measures of nationalization, compulsory liquidation, expropriation, or other taking on or before the date of this Agreement, excepting real property owned by the Government of the United States;

(2) obligations expressed in currency of the United States arising out of contractual or other rights acquired by nationals of the United States prior to September 1, 1939, and which became payable prior to September 15, 1947;

¹ For complete text, see 42 Fed. Reg. 8176-77 (1977), 16 ILM 388 (1977).

² TIAS No. 7569; 24 UST 522.

³ For background concerning this matter, see the 1975 US DIGEST 492.

(3) obligations of the Hungarian People's Republic under Articles 26 and 27 of the Treaty of Peace between the United States and Hungary dated February 10, 1947; and

(4) losses referred to in the note of December 10, 1952 of the Government of the United States to the Government of the Hungarian People's Republic.

In response to inquiries from U.S. citizens concerning these blocked accounts, Fabian A. Kwiatek, Assistant Legal Adviser of the Department of State, took the following position:

Subsequent to the claims settlement agreement of March 6, 1973, between the Governments of the United States and Hungary, the National Bank of Hungary began canceling all forint [foreign interest] bank accounts owned by all residents of the United States on the grounds that claims based upon such accounts were settled by the agreement. The Department of State does not agree with the interpretation placed on the agreement by the Government of Hungary. It is the Department's view that claims for canceled bank accounts which were established from funds which the property owners agreed to accept as compensation for the property or utilized the proceeds of the account subsequent to its establishment were not settled by the agreement. Canceled bank accounts which were inherited or established from funds not related to the taking of property were also excluded from the agreement. However, the Department recognizes that there may be some canceled bank accounts which were unilaterally established by the Government of Hungary with funds paid for the taking of property which may be legally valid claims under the agreement, assuming the claims are otherwise valid under principles of international law.

.....

At the time the agreement was concluded, the Department was very much aware of the existence of certain blocked bank accounts owned by nationals of the United States in Hungarian banks which were established from funds received for the taking of property in Hungary. The agreement did not include claims for such blocked accounts, in general, because the blocking of such accounts did not give rise to legally valid claims against the Government of Hungary under principles of international law. The claims settled by the agreement would entail the international responsibility of the Government of Hungary. In connection with blocked bank accounts, it is universally recognized that any country has the right in the protection of its economy to pass currency regulations and to prevent the flow of capital beyond its borders. Numerous American nationals who have had funds abroad have come within the purview of such currency regulations enacted by several countries.

Since many blocked accounts in Hungarian banks were established with the approval and concurrence of nationals of the United States and not taken by the Government of Hungary on March 6, 1973, the date of the above-mentioned claims settlement agreement, there was no loss to the owners of such accounts other than the one resulting from limited access to the funds. The confiscation of such blocked accounts subsequent to the claims agreement under the circumstances mentioned above immediately gave rise to legally valid claims under

principles of international law on the date the accounts were confiscated. In this connection, the claims agreement between the respective governments provides for the settlement of "outstanding" claims, as stated in the Preamble of the agreement and defined in Article 2 of the same agreement. Those claims for confiscated blocked bank accounts which were excluded from the agreement were not outstanding claims on the date of the agreement.³

On August 16, 1976, the Embassy of the United States in Budapest submitted a note to the Ministry of Foreign Affairs of the Hungarian People's Republic expressing the expectation that the matter of the blocked accounts of U.S. citizens would be resolved in the near future. On February 15, 1977, the Hungarian Ministry of Foreign Affairs responded to the U.S. Embassy with a diplomatic note which resolved the blocked accounts issue in favor of the United States.

The Hungarian note read, in part, as follows:

The balances on the blocked accounts in question were deprived following the conclusion of the agreement between the Government of the Hungarian People's Republic and the Government of the United States of America regarding the settlement of claims, signed on March 6, 1973, because according to the Hungarian interpretation of the said agreement those amounts had not been due to the U.S. citizens.

Taking into consideration that this interpretation has been challenged by the Government of the United States, the Hungarian side—governed by the desire to develop relations between the two countries—is prepared to settle this matter on the basis of equity, ceasing the debate on that interpretation. As a consequence, the blocked accounts of U.S. citizens shall be credited with the amounts which were deprived from those accounts with reference to the agreement between our two governments regarding the settlement of claims, signed on March 6, 1973.

At the same time, the owners of the blocked accounts will be granted to utilize the balances on their accounts in accordance with the general rules in Hungary.⁴

ECONOMIC SANCTIONS

(U.S. *Digest*, Ch. 10, §12)

Southern Rhodesia

On March 18, 1977, President Carter signed into law H.R. 1746, P.L. 95-12, which effectively reinstated an embargo against the importation of Rhodesian chrome and other minerals, as well as any steel mill product containing Rhodesian chromium. The bill, which passed the House of Representatives by a vote of 250-146 and the Senate by a vote of 66-26, permits the President to suspend operation of the embargo if he determines that such suspension will further the cause of a peace settlement and will enhance the possibility of majority rule in Rhodesia. On March 18,

³ Dept. of State File No. P76 0165-755. ⁴ Dept. of State File No. D77 0055-253.

1977, President Carter also issued Executive Order 11978, which authorized the Secretary of the Treasury to exempt from the provisions of that order and Executive Order 11322, as amended, shipments of chromium then in transit to the United States. President Carter, on signing H.R. 1746 into law, characterized the importance of this legislation as follows:

This legislation probably has as high a symbolic importance in international affairs as anything that I will do this year. It's something that I sign with gratitude and appreciation on the one hand, and regret on the other—gratitude and appreciation because the Congress and I have demonstrated vividly that we are deeply concerned about our own abandonment of a unanimous decision made by the United Nations in which our country participated, in effect, on its word of honor, and then later because of pressing circumstances revoked.

The regret is that we've not been able to work harmoniously with a legitimate government in Rhodesia/Zimbabwe. As you know, there is an illegal government there. They have not been willing yet to come forward and negotiate effectively between the white and black citizens of Rhodesia, and this is something that all of us regret.¹

Cambodia, Cuba, North Korea, North Vietnam, and South Vietnam

On March 21, 1977, the Office of Foreign Assets Control of the Department of the Treasury issued amendments, which were effective immediately, to the Foreign Assets Control Regulations (31 CFR Part 500) authorizing persons who visit Cambodia, Cuba, North Korea, North Vietnam, or South Vietnam to pay for their transportation and maintenance expenditures such as meals, hotel bills, taxis, and the like while in those countries.¹ Section 500.563, which deals with North Korea, North Vietnam, South Vietnam, and Cambodia, and section 515.560, which deals with Cuba, authorize a visitor to the named countries to buy a maximum of \$100 worth of goods at foreign market value for personal use and not for resale. This allowance may be used only once every six months. Goods purchased may only be brought back by the traveler in his baggage. The new General License contained in these sections does not authorize any other transactions with nationals of those countries.

Journalists, researchers, news and documentary filmmakers, and others who visit those countries for like purposes are authorized to acquire films, magazines, books, and similar publications which are directly related to their professional activities, *i.e.*, for their own or their employer's use, and cannot be resold.

In addition, parallel authorizations were issued permitting American-owned or American-controlled foreign firms to pay for travel expenditures made by their foreign national employees in the named countries.

¹ 13 WEEKLY COMP. OF PRES. DOCS. 402-03 (Mar. 21, 1977). 42 Fed. Reg. 15403 (1977).

For the full texts of Executive Orders 11322, 11419, and 11978, all relating to trade and other transactions involving Southern Rhodesia, see 3 CFR 1966-1970 Comp. pp. 606-09, 3 CFR 1966-1970 Comp. pp. 737-39, and 42 Fed. Reg. 15403 (1977), respectively. For the text of the amendments to the Code of Federal Regulations implementing P.L. 95-12 (31 CFR 530.202, 530.313, 530.503, 530.519, 530.520, 530.521, 530.522, and 530.808), see 42 Fed. Reg. 18073-75 (1977).

¹ 42 Fed. Reg. 16621 (1977).

JUDICIAL DECISIONS

ALONA E. EVANS

Extradition—whether offense listed in treaty—evidence—Extradition Treaty of 1971 with Canada

In re MAGISANO. 545 F.2d 1228.

U.S. Court of Appeals, 9th Cir., Nov. 16, 1976.

Petitioner sought habeas corpus relief against an order for his extradition to Canada on charges of conspiracy to counterfeit U.S. currency and possession of such counterfeit currency. The District Court denied his petition. Petitioner appealed, contending *inter alia* that the offenses charged were not listed in the Extradition Treaty of 1971 with Canada (TIAS No. 8237) and that incompetent evidence had been introduced in support of the charges. The Court of Appeals affirmed the District Court's decision.

Circuit Judge Ely pointed out that the treaty clearly covered the charges against the accused.¹ With regard to the complaint about the evidence, the Court observed that there appeared to be ample evidence inculcating the accused but that in any event hearsay evidence was admissible in extradition proceedings. Moreover, as Canadian law respecting the use of illegal wiretapping was similar to that of the United States, it could be assumed that Canadian courts would consider the accused's contentions in this regard.

Extradition—surrender barred by plea bargain—Extradition Treaty of 1900 with Switzerland—rights of fugitive offender

PETITION OF GEISSER. 414 F.Supp. 49.

U.S. District Court, S.D.Fla., May 21, 1976.

Petitioner, a Swiss national, had sought to enjoin an order for her extradition to Switzerland on a murder charge. The extradition request had been made pursuant to the Extradition Treaty of 1900 with Switzerland (31 Stat. 1928, TS No. 354, 11 Bevans 904). Extradition was to follow petitioner's completion of a sentence which she was serving in the United States for violation of the narcotics laws. Petitioner argued that in exchange for turning state's evidence in the narcotics case and pleading guilty to two counts thereunder, she had been assured that she would be imprisoned for three years and then paroled and that she would not be deported to Switzerland. For its part, Switzerland apparently made the extradition request without knowledge of these negotiations. The District

¹ The treaty follows a new format, providing for surrender of an accused "for any of the offenses listed in the Schedule annexed to this Treaty, which is an integral part of this Treaty, provided these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year." (Art. 2(1)). Ed.

Court ordered petitioner's release and enjoined enforcement of the extradition order. On appeal, the Court of Appeals vacated this order and remanded the case for further proceedings concerning the nature of the plea bargain. (513 F.2d 862 (5th Cir. 1975); 70 AJIL 144 (1976).) On remand, the District Court granted petitioner's application for release and vacated the extradition order.

District Judge Mehrtens pointed out that the Court's concern was for the protection of petitioner's rights with respect to the plea bargain, pursuant to *Santobello v. New York*, 404 U.S. 257 (1971), as against differing views of the Departments of Justice and State regarding the relationship between the plea bargain and the extradition order. In the Court's opinion, the government had been doubly at fault in holding petitioner beyond the three-year term and in taking no action to prevent her from being delivered to Swiss authorities, both of which were obligations agreed to in the plea bargain. Judge Mehrtens did not concede that the "terms of an international extradition treaty [could] be the sole determining factor"¹ here. The Court said:

But simply because departments of the Executive Branch decline to bear an onus which may attach to their obligations of defending rights granted by our Federal Constitution, such acquiescence to diplomacy or legalistic formality cannot justify the Judiciary's following a similar course. The sanctity of the Constitution, and the protections it guarantees, are the foremost considerations here. The "constitutional obligations owing Bauer [a/k/a Geisser]" recognized by the Fifth Circuit must take precedence over any treaty obligations to a foreign nation. If, as the Opinion of the Fifth Circuit intimates, this result causes Switzerland to feel aggrieved, "its avenues of redress would more likely be through diplomatic means or in international tribunals."²

Refugees—1967 Protocol to Convention Relating to Status of Refugees—excludable aliens

PIERRE V. UNITED STATES. 547 F.2d 1281.
U.S. Court of Appeals, 5th Cir., March 7, 1977.

Petitioners, 147 Haitian nationals, were among 216 Haitians who came to the United States by small boat in 1972 and 1973. The Immigration and Naturalization Service (INS) held that petitioners were excludable aliens (8 U.S.C. §1182(a)(20)). Petitioners, claiming to be political refugees within the terms of the 1967 Protocol to the Convention of 1951 Relating to the Status of Refugees (19 UST 6223, TIAS No. 6577, 606 UNTS 267), then sought admission into the country in parole status, which could be granted within the discretion of the Attorney General (8 U.S.C. §1182(d)(5)). The INS denied this request, finding that petitioners could not be classified as political refugees because they could not show that they had been subject to political persecution in Haiti. Petitioners then sought writs of habeas corpus. The District Court denied their

¹ 414 F.Supp. 49, 52.

² *Id.* quoting *Geisser v. United States*, 513 F.2d 862, 870, 873 (5th Cir. 1975).

petitions but remanded the case for further administrative proceedings regarding proof of their alleged refugee status. When it became apparent that there were no further developments at this level, the case was appealed on the grounds that Article 33 of the Protocol eliminated the Attorney General's discretion in regard to the exclusion of refugees and that the Protocol endowed refugees with full rights under the Due Process Clause of the Fifth Amendment. The Court of Appeals affirmed the District Court's denial of habeas corpus relief.

In rejecting petitioners' argument as to the thrust of the Protocol, Circuit Judge Ainsworth said:

[A]ccession to the Protocol by the United States was neither intended to nor had the effect of substantively altering the statutory immigration scheme. From this determination we draw two conclusions: that no new rights or entitlements were vested in these petitioners by operation of the Protocol, and that the procedures by which the INS determines refugee status were not invalidated.

Petitioners' contention that the Senate's accession to the Protocol vested in aliens a United States constitutional entitlement accompanied by a full array of constitutional protections flies in the face of the legislative history just reviewed. This is just the sort of "radical change" in our immigration laws which the Senate did not intend. The entire immigration scheme would be nullified if any alien desiring entry could demand the full process of the courts to adjudicate his refugee status, merely by appearing at our shores and proffering assertions of status of the nature of those in this case. Therefore, we reject petitioners' contention that the Protocol invests them with a liberty right protectable by due process or other constitutional protections.¹

The Court observed that Congress' power to control immigration enabled it to make distinctions between aliens such as petitioners, who were excludable, and aliens who having entered the country, legally or illegally, would have access to the constitutional guarantees of due process.

Jurisdiction—objective territorial theory

UNITED STATES V. CASTILLO-FELIX. 539 F.2d 9.
U.S. Court of Appeals, 9th Cir., July 9, 1976.

Defendant was convicted on two counts of encouraging and inducing Mexican nationals to enter the United States unlawfully and on two counts of counterfeiting alien registration receipt cards for the use of said aliens. It was charged that defendant, in one instance, delivered the counterfeit card and three passport pictures to a Mexican national in Mexico in exchange for \$80 and then collected the rest of his fee when the alien reached a certain café in Tucson, Arizona. In the second instance, defendant, having provided the alien with passport photographs, showed him a hole in the boundary fence, collected \$150, and later delivered a counterfeit card to the alien at the same café. On appeal, defendant argued that the alleged inducement to illegal entry had not occurred within

¹ 547 F.2d 1281, 1288-89.

U.S. jurisdiction and that the government had not submitted sufficient evidence to convict him of counterfeiting. The Court of Appeals sustained the conviction on the counts of inducement but vacated the conviction on counterfeiting and remanded the case for further proceedings as to where the counterfeiting had taken place.

With regard to the charges of inducing illegal entry, District Judge Smith, sitting by designation, said:

Acts of inducing aliens to enter the United States or of counterfeiting alien registration receipt cards have no purpose unless they are intended to facilitate the unlawful entry of an alien or his continued illegal residence in the United States. The effect of such crimes committed out of the United States takes place in the United States, and, in terms of the regulation of immigration, it is unimportant where acts constituting the crime occur.¹

Extradition—specialty—evidentiary restrictions

UNITED STATES v. FLORES. 538 F.2d 939.

U.S. Court of Appeals, 2d Cir., July 9, 1976.

Defendant, a U.S. national of Puerto Rican origin, was extradited from Spain on charges of conspiracy to sell narcotics in violation of 21 U.S.C. §§173, 174. Extradition was granted pursuant to the Extradition Treaty of 1904 between the United States and Spain, which was in force at the time when the offenses occurred (35 Stat. 1947, TS No. 492) and the Geneva Convention of 1936 for the Suppression of Illicit Traffic in Dangerous Drugs, to which Spain became party on September 3, 1970 and which made narcotics traffic an extraditable offense. The charges against the fugitive covered the period from January 1968 to April 30, 1971. The extradition order, however, limited prosecution to acts committed by the accused during the period between September 3, 1970, when Spain became party to the Convention, and April 30, 1971. In a note to the Spanish Government, the United States agreed to this condition.

At a pretrial hearing, defendant argued that, pursuant to the terms of the extradition order, the government could not introduce at the trial any evidence concerning the conspiracy between 1968 and September 3, 1970. The District Court, in a pretrial order, informed the government that with respect to this phase of the conspiracy the government would be limited to introducing witnesses who could testify "when they first ran into Flores . . . , how long they had known Flores and . . . what Flores told them to do."¹ On appeal by the government, the Court of Appeals reversed this decision.

Circuit Judge Mansfield found that 18 U.S.C. §3731 had not been violated as to time limits for filing the appeal nor as to the purpose for which the appeal was filed. As to the merits of the case, the Court pointed out that a distinction must be made between charges for which the accused could be prosecuted and which, under the extradition order, would have

¹ 539 F.2d 9, 13, citing *United States v. Bowman*, 260 U.S. 94, 98 (1922).

² 538 F.2d 939, 942.

to arise within the stated period, and evidence which would contribute to the clarification of those charges. The Court observed that in U.S. practice "although prosecution of an earlier offense may be barred [by the statute of limitations or the *ex post facto* rule], it has long been established that evidence of that offense may nevertheless be introduced to prove a later crime which the government is permitted to prosecute."² Judge Mansfield continued: "Consequently, unless it is unequivocally clear that Spain was authorized under principles of international law and intended to limit the manner by which United States prosecutors might try a conspiracy case, we would feel constrained to follow domestic evidentiary rules."³ In the opinion of the Court, the Spanish extradition order could not be interpreted as endeavoring to establish conditions which were designed to constrain the use of the District Court's procedural and evidentiary rules. Judge Mansfield concluded that

[S]ubject to proper jury instructions, the relevant pre-September 3rd acts and statements of both Flores and his alleged co-conspirators are therefore admissible to the extent that they may demonstrate the existence of a conspiracy continuing into the date limits fixed by the Spanish Court and establish the intent and purposes of the conspirators during that period.⁴

Jurisdiction—irregular recovery of fugitive offender—Ker-Frisbie-Toscanino Rule

UNITED STATES v. LARA. 539 F.2d 495.
U.S. Court of Appeals, 5th Cir., Sept. 27, 1976.

Defendant was convicted on a charge of conspiracy to transport a stolen vehicle in interstate commerce. He also pleaded *nolo contendere* to a charge of bond jumping. Defendant appealed on the grounds that U.S. Government agents had tortured him in Panama and had then forcibly returned him to the United States for trial. The Court of Appeals remanded the case for an evidentiary hearing on the allegation of mistreatment by U.S. Government agents (532 F.2d 185 (5th Cir. 1975)). The District Court found no evidence in support of this contention. Defendant then appealed on the ground that the District Court lacked jurisdiction to sentence him on the two charges. The Court of Appeals affirmed.

In a *per curiam* opinion, the Court of Appeals said with respect to the matter of forcible recovery of a fugitive offender:

Forcible abduction does not in itself call for any application of the principle of *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) [69 AJIL 406 (1975)], even if that principle did apply in this Circuit. *But see United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974). Thus, the so-called *Ker-Frisbie* rule, which states that a court's jurisdiction over a defendant cannot be defeated because of the manner in which the defendant was brought before the court, applies to this case. *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886); *Frisbie v.*

² *Id.* 943. Citing *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957) *inter alia*.

³ *Id.* 944.

⁴ *Id.* 945.

Collins, 342 U.S. 519, 72 S.Ct. 112, 96 L.Ed. 651 (1952). See *United States v. Herrera*, *supra*.¹

ZAMBIAN CASE NOTE

Jurisdiction—visiting armed forces—members of liberation movement—availability of constitutional guarantees in host country

SHIPANGA V. ATTORNEY GENERAL.

Supreme Court of Zambia, Sept. 21, 1976.

57 *Review of International Commission of Jurists* 58 (Dec. 1976).

While applicant, an officer of the South West African Peoples Organization (SWAPO), the Namibian independence movement, was residing in Zambia, a controversy within the leadership of SWAPO led the Zambian Government to place applicant and ten other members under supervision for their safety. Applicant sought habeas corpus relief. The Attorney General denied that applicant was under detention but contended that as a member of a visiting armed force, he was subject only to its rules and could not invoke Zambian constitutional rights and guarantees. The High Court denied the application. Applicant then appealed to the Supreme Court but was removed from the country before the appeal could be heard. The Supreme Court granted his application.

In the opinion of Deputy Chief Justice Baron, applicant had been unlawfully detained by Zambian authorities and the writ of habeas corpus should issue as a protective measure despite applicant's absence from the country. The Court declined to examine the question of the status of visiting armed forces.

Chief Justice Silungwe, dissenting, argued that members of armies of liberation had been accorded recognition as visiting armed forces under the common law of Zambia, which he found to be comparable to United Kingdom legislation in regard to visiting forces.

¹ 539 F.2d 495.

BOOK REVIEWS AND NOTES

Edited by Leo Gross

THE LAW OF THE SEA: RECENT TRENDS IN THE LITERATURE

- The New Law of the Sea: Influence of the Latin American States on Recent Developments of the Law of the Sea.* By Karin Hjertsonsson. Leiden: A. W. Sijthoff, 1973. Pp. 187. Bibliography.
- Chile y el Derecho del Mar: Legislación y acuerdos internacionales, práctica y jurisprudencia sobre mar territorial, plataforma continental, pesca y navegación.* By Francisco Orrego Vicuña. Santiago de Chile: Editorial Andres Bello, 1972. Pp. 399. Indexes.
- Die Ansprüche der lateinamerikanischen Staaten auf Fischereivorrechte jenseits der Zwölfmeilengrenze.* By Ondolf Rojahn. Hamburg: Hansischer Gildenverlag, 1972. Pp. 308. Bibliographies. Appendix.
- Freedom of Oceanic Research* (A Study Conducted by the Center for Marine Affairs of the Scripps Institution of Oceanography, University of California, San Diego). Edited by Warren S. Wooster. New York: Crane, Russak & Company, Inc., 1973. Pp. 255. Appendices.
- Zur Neuordnung des Meeresvölkerrechts auf der Dritten Seerechtskonferenz der Vereinten Nationen.* By Renaté Platzöder and Wolfgang G. Vitzthum. Eggenberg: Stiftung Wissenschaft und Politik. Forschungsinstitut für Internationale Politik und Sicherheit, 1974. Pp. 305. Bibliography. Appendices.
- Actualités du droit de la mer.* Colloque de Montpellier, Société Française pour le Droit International. Paris: Editions A. Pedone, 1973. Pp. 296.
- Der Rechtsstatus des Meeresbodens: Völkerrechtliche Probleme der Zuordnung und Nutzung des Grundes und Untergrundes der Hohen See ausserhalb des Festlandsockels.* By Wolfgang Graf Vitzthum. Berlin: Duncker & Humblot, 1972. Pp. 385. Appendices. Bibliography.
- International Regulation of Marine Fisheries: A Study of Regional Fisheries Organizations.* By Albert W. Koers. London: Fishing News (Books) Ltd., 1973. Pp. 368. Appendices. Bibliography. Index.
- Global Marine Attributes.* By John King Gamble, Jr. Cambridge, Mass.: Ballinger Publishing Company, 1974. Pp. 270.

Some day perhaps somebody will receive a foundation grant to make a detailed study of changes in the literature of international law: changes of theme, purpose, emphasis, scale, and format. It is suspected that a study of this kind would reveal just how highly "reactive" the legal literature tends to be to political, economic, military, and other changes in the international scene. In the meantime, until a quantifier comes along, we may be entitled to assume that changes in the pattern of international events have a direct effect on the literature of international law. We are almost

certain to find a close correspondence, for example, between the emergence of East-West ideological rivalry and the development of the doctrine of peaceful coexistence; between experiments in nation-building and the legal consequences of expropriation; between Vietnam and the rules of intervention; between the *Torrey Canyon* and proposals for an expansion of state responsibility for ship-generated pollution. It may also be guessed that the same kind of study would tend to show that academic and government international lawyers in the same national or cultural milieu share more or less the same perceptions of world issues and approximately the same order of priorities, if not the same value judgments. In short, it can probably be demonstrated that the international legal literature evolves in accordance with the parallel or converging perspectives of these two similarly educated but role-differentiated elites.

If correlations of this kind can be established, we can imagine the discovery of some interesting hypotheses for testing. For instance, it might be seen that in the field of international law the academic "observer" and government "participant" are potentially interchangeable, a discouraging thought for academic lawyers who like to feel apart from their government counterparts but are faced with evidence that, influenced by the same stacks of official documentation, they tend to focus on the same stock of issues as do others from the same political system, the same level of national development, or the same genetic pool. Government international lawyers have always been prominent contributors to the academic literature, but what is newer is the difficulty of distinguishing the official from the academic in terms of what they write about.

Indeed it may be true that in most parts of the world today the academic literature of international law has become a relatively accurate reflection of trends in official thinking about international issues, rather than a repository of independent thought and scholarship. If so, there may soon be a temptation to use the literature as a barometer for the purpose of short term forecasts, surely an attractive prospect for those analysts who see the world as one of actual or potential conflict between competing systems or between greedy and resentful nations. If the current literature of international law does in fact reflect a convergence of official and academic perspectives, familiarity with it should help to shield the reader from the shock of wholly unrehearsed legal ideas or arguments, if not from the occasional diplomatic surprise!

These thoughts come to mind as one reads, or rereads, some of the law of the sea literature which appeared just as the Third United Nations Conference on the Law of the Sea (UNCLOS III) was getting under way three years ago. Certainly no previous diplomatic event has had such a profound and long-lasting effect upon the relationship between participant and observer. What seems likely is that we are witness to an unprecedented transformation of the literature of international law, and that the law of the sea phenomenon may be only the "first wave."

Now almost the dominant theme in the literature of international law, the law of the sea twenty years ago was only a modest subdivision under

the heading of "Jurisdiction" in the ordinary textbook. But it is worth recalling that the law of the sea literature had already seen a number of changes of style and emphasis before 1960, when the failure of UNCLOS II signalled the "end of an era" in the history of lawmaking. It was, after all, law of the sea issues that introduced the most famous polemical encounters, if not the polemical style, to the literature of international law early in the 17th century.¹ It was in this field that international legal doctrine was first developed, more or less consciously, as a highly civilized mode of rationalizing the "politics of advantage."² Yet the "law of the sea" had not been coined as a phrase, or at least as a term of art, until the early 20th century. Even in the late 19th century, textbook writers generally first referred to the sea as an exception to the state's right to acquire property and wrote about its importance more as an area of special rights in the law of war and neutrality than as an object of state jurisdiction.³ Indeed, right up to the end of World War I questions of maritime jurisdiction were treated by reference to very simple, even primitive, *spatial* concepts, and those early legal writings on the sea seem today to possess something of the charm of political innocence.

The law of the sea emerged as a distinguishable compartment of international law in the interwar period, chiefly through the perceptions of jurists. The products of their writing took various forms: general reference books,⁴ systematic treatises,⁵ historical studies,⁶ and special monographs.⁷

¹ One of the many effects of UNCLOS III has been a return to what might be described as quasi-polemical confrontation in the law of the sea, somewhat along the same lines as those delineated in the famous encounter between Hugo Grotius and John Selden. The *mare liberum v. mare clausum* controversy may resemble the contemporary North-South issues sufficiently to inhibit the advocates of the North philosophy, who may also be affected by a sense of political inevitability about the outcome in conference diplomacy.

² Grotius is justly famous for the systematic nature of his scholarship, but he was equally prominent as an advocate for his client. Major jurists of later eras did not, as a rule, consciously adopt the role of advocate in their scholarship, and it is only in fairly recent years, as other cultural perspectives have been brought to bear on the evolution of international law, that we are all familiar with the charge that international law in general was devised as a sophisticated normative system designed to rationalize and vindicate the policies of the rich and privileged states. The doctrine of the freedom of the high seas has, of course, been denounced by many of the newer states as an ingenious, fair-sounding device designed to perpetuate the built-in comparative advantages of mobility favoring the rich shipping states.

³ See, e.g., W. E. HALL, TREATISE ON INTERNATIONAL LAW 58, 125-42, *et seq.* (2d ed. 1883).

⁴ See, e.g., C. J. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA (1942).

⁵ See, e.g., G. GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER (2 vols., 1932); and more recently, M. S. McDUGAL & W. T. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA (1962).

⁶ See, e.g., T. W. FULTON, SOVEREIGNTY OF THE SEA (1911); P. T. FENN, THE ORIGIN OF THE RIGHT OF FISHERIES IN TERRITORIAL WATERS (1926); P. C. JESSUP, LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION (1927); A. S. DE BUSTAMANTE Y SIRVEN, EL MAR TERRITORIAL (1930); and C. V. MEYER, THE EXTENT OF JURISDICTION IN COASTAL WATERS (1937).

⁷ See, e.g., S. A. RIESENFELD, PROTECTION OF COASTAL FISHERIES UNDER INTER-

By this time state practice was becoming more differentiated, and individual claims and practices required more serious study. The existence of the League of Nations and of high hopes for international regulation helped of course to cultivate the taste for uniformity and equality as the ideal form of equity and for codification as the preferred mode of legal order. But jurisdictional issues were still seen as turning essentially on questions of ownership rather than on problems of management.

With the development of shallow seabed technology in the late 1930's, it became possible to regard the ocean as a *resource*, rather than as a space, but just how acquisitive nations were to become in claiming new rights to ocean resources was not foreseen. The prescientific period of optimism associated with the interwar years was now to give way to a period of genuine scientific concern, accompanied, it may be said, by a degree of political naiveté. Both were reflected in the approach to the conservation of living resources and would later be observed in the legal attempt to control pollution.⁸ Marine scientists had arrived early in the world of marine policymaking, but they were slow to make an impact on marine policy studies. Once the resource economists turned to the sea, on the other hand, they were much quicker in establishing themselves in the literature by forming a natural coalition with scientists and administrators which in the developed world produced the idea of *ocean management*. Although up to 1960 it was still accurate to characterize the law of the sea as an area of legal inquiry, dominated by lawyers and conducted within juridical frameworks of reference, the prospect of "ocean management" encouraged lawyers, especially in the developed world, to produce innovative ideas based on "functional" rather than territorial concepts of state authority and motivated by the desire for increased efficiency in the use of resources. Now, of course, with the injection of law of the sea issues into the more general debate on "the new international economic order," lawyers are reacting by developing ideas and arguments around the theme of "equity" or justice.⁹ Accordingly, the literature on the law of the sea provides an unusually clear reflection of the bewildering changes at work in the intellectual world of the modern international lawyer.

In addition to these important thematic and perceptual changes, the law of the sea field of studies has undergone a radical transformation of scale. Especially since the UN Seabed Committee began its work in 1968, there has been a steadily mounting volume of writings on the subject, reflecting a major preoccupation of international lawyers, both in the world of government and diplomacy and in the university and private research

⁸ INTERNATIONAL LAW (1943); and, more recently, N. M. POULANTZAS, *THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW* (1968).

⁹ See, e.g., Scientific Papers and Proceedings of the UN Scientific Conference on the Conservation and Utilization of Resources, held at New York in 1949, and the Technical Papers and Report of the UN International Technical Conference on the Conservation of the Living Resources of the Sea, held at Rome in 1956.

⁹ Franck, El Baradei, and Aron, *The New Poor: Land-locked, Shelf-locked and Other Geographically Disadvantaged States*, 7 N.Y.U.J. INT. LAW AND POLS. 33 (1974); and Johnston, *The New Equity in the Law of the Sea*, 31 INT. J. 79 (1975-76).

communities. In almost all parts of the world today, though not yet in North America, most of the regular contributors to the international legal literature have been forced or tempted to turn their pen to current issues in the law of the sea, even perhaps to the point of distracting attention from other areas of international legal inquiry and concern. The reasons for this phenomenal obsession with the sea are evident: Most governments believe that it serves the national interest to publicize their views in the academic community through the writings of their officials. Many academic specialists in the law of the sea have been pressed into service for conference-related purposes as delegates, advisers, consultants, or observers, and therefore have access to an unprecedented volume of official documents. The comprehensiveness and many-sidedness of UNCLOS III, the special difficulties of the Conference both as a treaty-making exercise and as a law reform movement, the radical nature of some of the more salient proposals and developments, the emotive nature of many of the issues and of the modes of diplomacy resorted to have all had their impact. In short, there is now something for almost everybody in the law of the sea, not just for the "specialists." In deciding to write on the subject, the international lawyer today enjoys the luxury of choosing between a number of quite distinctive roles.

It is worth noting that it was the academic community, not government service, that first grasped the radical conceptual change at work in the law of the sea after UNCLOS I and II. The explosion of writings on the law of the sea did not come with the suddenness of Ambassador Pardo's famous speech in the world of diplomacy, but the field did begin to evolve into its present form—the study of *international marine policy* problems—several years before the change seems to have been clearly understood in the diplomatic world. Early in the 1950's the academic community began to develop cross-disciplinary inquiries within the field. The slowness of the diplomatic world to appreciate what was happening was evidenced by the "legalistic" approach adopted at UNCLOS I. By the early 1960's, however, while the four 1958 Geneva Conventions were still collecting signatures and ratifications, it had become more generally apparent that the two 1958 Conventions that were essentially progressive development of the law¹⁰ were based on assumptions which were rapidly being rendered obsolete by changes in the technology of fishing, drilling, and mining.

In 1966, two years before the UN Seabed Committee began its work, the Law of the Sea Institute was created at the University of Rhode Island on the initiative of three nonlawyers.¹¹ By the end of the decade the non-legal names of Alexander, Knauss, Christy, Pontecorvo, Schaefer, Crutchfield, Craven, Wooster, and others were as familiar in the law of the sea literature in North America as the names of legal specialists such as Burke,

¹⁰ Convention on the Continental Shelf, 15 UST 471, TIAS No. 5578, 499 UNTS 311, 52 AJIL 858 (1958) and Convention on Fishing and Conservation of the Living Resources of the Sea, 17 UST 138, TIAS No. 5969, 559 UNTS 285, 52 AJIL 851 (1958).

¹¹ John Knauss (oceanographer), Lewis Alexander (geographer), and Dale Krause (oceanographer).

Chapman, Young, Clingan, Goldie, and others, as well as less specialized jurists like McDougal and Jessup. Political scientists, rather strangely, were slow to enter the field in North America despite its growing importance in international politics, UN diplomacy, and developmental policy-making, but early contributors such as Friedheim would soon be followed by other specialists such as Miles, Hollick, Gamble, Kildow, Johnson, and Euzan. Now, in the late 1970's, we are just beginning to see the turning of sociologists and anthropologists toward the law of the sea, providing a useful and necessary focus on "coastal community studies."¹²

As a result, a remarkable diversity of theme, emphasis, and writing style can now be seen in the law of the sea literature. The field itself has expanded to a multilevel, multidisciplinary investigation of international marine policy problems. For many of the newer writers, the field is seen as a maritime application of other disciplines, such as: resource economics, political geography, science policy, international politics, international organization, Third World studies, area studies, foreign policy studies, development studies, conflict resolution, diplomatic and naval history, strategic studies, conference diplomacy studies, and even cross-cultural psychiatry.¹³ Indeed legal writers on the "law of the sea" may already be outnumbered by nonlegal writers, just as some academic conferences on the subject are attended by more nonlawyers than lawyers.

Another effect of the variety of contributors is a differentiation of style. Rigid preconceptions of what constitutes a "solid" article for the purposes of an academic journal have had to be loosened. As the UN Seabed Committee progressed and finally yielded to the Conference proper, political awareness and diplomatic sophistication became more prized among many writers than the ability to analyze texts and to cite precedents. New ideas, conceptual imagination, and interdisciplinary sensitivity, rather than erudition and methodological rigor, are now regarded as the hallmarks of the best writers. The specialists have had to learn to respond quickly and flexibly to the latest developments in an area of immensely complex and nicely nuanced diplomacy, a task that is virtually impossible without having the "inside track" in one capacity or another. Some of the leading academic writers on the subject have delegate status and their writing is accordingly inhibited in some degree; but other academic specialists in the same position have used their published works in the cause of advocacy and not always the cause adopted by their delegation. In truth, there is an extremely broad range of roles now available to academics in the field: propagandist, apologist, expositor, conscience-keeper, house critic, prophet of doom, sceptic, theorist, idealist, altruist, dismayed spectator, and no doubt many others. Few of the regular contributors are perhaps able to

¹² See, e.g., the chapters by Raoul Andersen, Geoffrey Stiles, and Paul Alexander in *MARINE POLICY AND THE COASTAL COMMUNITY* (D. M. JOHNSTON, ed., 1976).

¹³ The last of these approaches may not appear in the literature until after the conclusion of UNCLOS III which, because of its protracted course and stressful features, has engaged the interest of psychiatrists, more perhaps than any other diplomatic conference.

confine themselves exclusively to one of these roles on all issues, although some of the NGO observers have adopted a consistently critical, world federalist posture in their writings on UNCLOS III, and one or two critics of the Third World strategy have made this into a fairly constant motif.

The law of the sea phenomenon has also contributed to the emergence of a wider variety of form or format in the literature of international law. In addition to general reference books, systematic treatises, monographs, and periodical articles, there are now innumerable documentary reports, official and nonofficial compilations, conference proceedings (which are themselves usually an amalgam of diverse kinds of presentations), symposia, commissioned studies that are allowed to find their way into published form, and a plethora or occasional but professional (or semiprofessional) pieces appearing in popular journals and even newspapers. Indeed the appearance of writings designed for the layman is one of the more interesting developments in the literature, since it may have the desirable effect of taking some of the mystique out of international law.

The last five years have been a bad time to attempt a general reference book on the law of the sea. Events have been too numerous and too transient, and newcomers have had to get by without the benefit of a convenient introductory text. Similarly, the period since 1967 has been no time to undertake a systematic treatise. Clearly new major works of both kinds will be needed very badly in the aftermath of UNCLOS III. Monographic writings, on the other hand, continue to pour out on almost every issue area covered by the Conference, despite the perils of rapid obsolescence of studies of matters which are the object of current negotiations. The explanation for this lies in the nature of the academic profession which demands the production of scholarly dissertations for advanced degrees and admission to the university teaching profession. Predictably the flood of Seabed Committee and UNCLOS III documents has proved irresistible to doctoral candidates and their supervisors in political science departments as well as law schools. Like dissertations generally, these works are intended chiefly to demonstrate the author's scholarly ability, and it is a secondary consideration whether they are likely to be of lasting value—a goal which may indeed elude other contemporary writers on the subject.

Some, though not all, of these literary trends are reflected in the writings reviewed here. Most of the above observations are drawn from the North American scene and some of them may have less validity in other regions than I believe they have for this continent. It would certainly be instructive to make a careful comparison of the contributions from all major regions to the law of the sea literature. Indeed "interregional comparative studies" would be useful in other areas of international law, throwing some much needed light on the relevance of culture, tradition, and environment to the making of international law. The diversity of regional approaches to the law of the sea is, however, of special interest as long as it remains uncertain whether a globally accepted convention will emerge from UNCLOS III.

Considerations such as these come readily to mind on reading the work

by Karin Hjertonsson. What she attempts is an appraisal of the trends in Latin American law and diplomacy on questions of coastal jurisdiction. In surveying these trends over the period from 1946 to 1966, she is quite candid about the "total confusion" engendered by the various claims and by multilateral declarations dating from the Santiago Declaration of 1952 promulgated by Chile, Ecuador, and Peru. Her analysis belongs partly, then, to the growing body of legal literature, mostly in Spanish, which attempts to clarify the juridical status of the Latin American marine areas to which these claims and declarations apply. One is, of course, struck once again by the extent to which these early Latin American claims, once so scornfully denounced outside the region, have been vindicated by later events at the global level, especially by proposals for an exclusive economic zone introduced at the UN Seabed Committee and carried through with widespread and growing support at UNCLOS III. But more interestingly, some of the ideas emanating from Latin America in the 1950's can now be seen as comparable with, and capable of influencing, regional developments elsewhere in the late 1970's. For example, in 1955 the CEP states submitted a proposal by which the 200-mile zone would be divided into three areas: (1) an area 12 miles from the coast; (2) areas historically exploited by the coastal state; and (3) other areas within the zone (p. 29). This proposal, then rejected by the United States, is not so very different from the trizonal situation emerging off the Canadian coast in the Northwest Atlantic.¹⁴

Almost all of the works on the law of the sea in Latin America seem bound inevitably to a review and analysis of marine legislation in the region, but a more useful feature of the Hjertonsson book is the comparison of national statutory development with national initiatives in conference diplomacy at the regional and global levels. Mrs. Hjertonsson's work will be helpful when it becomes necessary to interpret any reservations that the Latin American states may choose to attach to their ratification of an UNCLOS III treaty which differs in its particulars from their national legislation. Like many other writers on the law of the sea today, Mrs. Hjertonsson is drawn into the business of prediction by the existing uncertainties surrounding the outcome of UNCLOS III. Perhaps her boldest prediction is that in the Latin American region "the traditional territorial sea, based on the concept of sovereignty, will disappear and will instead be looked upon [merely] as the area in which the coastal state carries out its maximum functions" (p. 79). In Part II she goes further and attempts to predict the future development of the customary international law of the sea, justifying the effort on the questionable ground that "if we can make predictions about the future conventional law, such predictions will as a rule hold true for the future customary law" (p. 86). It may in fact be questioned whether a nation necessarily evidences the same set of national interest priorities at a difficult and protracted treaty-making exercise

¹⁴ Johnston, *The Future of Fishery Management in the Northwest Atlantic: Canadian Perspectives in THE ECONOMIC CONSEQUENCES OF A 200-MILE FISHING LIMIT* (L. Anderson, ed., 1976).

as those operating previously or subsequently during the enactment of national legislation, even though it will be conceded that "a desire to obtain an acceptable treaty will never lead a nation to sacrifice a national interest of great vital importance" (p. 90). In any event, it is worth noting the author's prediction that "the world community eventually will accept the basic Latin American position" (p. 116), a prediction that was bolder at the time of writing (1973) than it would be today. Despite the decision of the International Court of Justice that coastal jurisdictional claims must be regulated by some law ("The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law."), she argues that these Latin American claims could be upheld against other states by virtue of "special customary rules" applicable to the region, which she says come "close indeed to what could be called a tacit or informal treaty" (p. 156). In reviewing the jurisprudence of the Court, she has more difficulty in predicting whether it would uphold the validity of the "patrimonial sea" on the basis of equity derived from "the general principles of law recognized by civilized nations." In all probability, she concludes, the Court would be thrown back to the test of reasonableness. Other uses of this test she dismisses as an "inherently subjective" balancing of interests (p. 170), but her own formula of "progressive development," depending on the acceptance of "a dynamic approach to international law" (p. 171), may not appear to the reader to be much less arbitrary.

The work of Francisco Orrego Vicuña deals with the same subject matter but covers only the laws and treaties of Chile. Though it belongs almost exclusively to the category of documentary compilation, it has a suggestive as well as a purely factual value. The range of documentary sources of Chilean law and policy presented in this collection is remarkably extensive: from orthodox sources such as the treaty, convention, agreement, protocol, declaration, civil code, commercial code, organic law, ordinary statute, decree, ordinance, statutory regulation, international resolution, and decision of the Supreme Court, to less orthodox sources in the form of diplomatic correspondence, the legal opinion of government advisers, parliamentary motion, bill, memorandum, and message. From these sources the reader can obtain a rather full view of Chilean law, policy, and practice with respect to the territorial sea, the contiguous zone, the zone of exclusive exploitation, the maritime boundary, the Strait of Magellan; the continental shelf and seabed, navigation and fisheries, and other matters of maritime interest. Orrego Vicuña, who is an academic specialist in the law of the sea as well as a member of the Chilean delegation at UNCLOS III, presents this documentary collection as a picture of national policy, but these Chilean materials may be useful to other nations as they come to grips with the problems of implementation in the aftermath of UNCLOS III, for the Chilean legislation is of general relevance in an age that is likely to embrace a 200-mile exclusive economic zone. Chile was one of the first of the Latin American expansionists to limit its claim to sovereignty and

exclusive control over the natural resources of the zone; and the compiler may be justified in asserting (p. 26) that its (quasi-functionalist) legislation is consistent with the concept of the common heritage of mankind.

The third book on Latin American claims, written by Ondolf Rojahn, deals with Latin American states in general, but unlike the first two it deals only with fisheries beyond the 12-mile limit. Because of this sharper focus, the author is able to produce a thorough and well-organized analysis in the German monographic tradition. In the first part he evaluates the fishery interests of the region, country-by-country, summarizes their fishery legislation, and reviews their experience in the exercise of fishery jurisdiction beyond twelve miles. But by far the largest part of the work is devoted to an appraisal of the attempts by these countries to provide a legal justification for their fishery claims.

Rojahn is less sanguine than Hjertonsen about the possibility of finding a justification for the more extensive Latin American fishery claims under customary international law. Indeed, after an extensive analysis of relevant doctrine, he is unable to find any established norm in general international law which requires other fishing states to comply with a coastal state's claim to exclusive fishery jurisdiction beyond twelve miles (pp. 144-50). He also adheres to the orthodox view in denying that regional treaty arrangements are capable of having any juridical consequences for extraregional third parties (pp. 150-55) and that a regional system of customary norms can be binding on states outside the region (pp. 156-61). In the same vein, he rejects the validity of the "contiguity" theories (pp. 201-04) and the "bioma" theory (pp. 204-08), more dogmatically perhaps than is justified in light of recent scientific findings about the relationship between the landmass and the coastal marine environment. Reference to the doctrines of self-help and self-preservation is judged to be equally unavailing (pp. 212-29). Most readers will, at least, accept the author's argument that the problem of underdevelopment in a coastal state cannot be solved by recourse to the legal concept of emergency and that little would be left in the doctrine if it were to become automatically applicable to a claimant invoking economic or nutritional need (p. 232).

Enough may have been said to indicate the conservative nature of Rojahn's work, but it should be recalled that it was finished in 1972, just as the now familiar concept of a 200-mile economic zone was becoming the *dée fixe* of the UN Seabed Committee and before the extent of support for this proposal at UNCLOS III had become apparent. The final section of the book, dealing with proposals for a fishery regime beyond a 12-mile territorial sea, has to a large extent been overtaken by events, but the author does recognize the unlikelihood that a worldwide fishery organization could be brought into existence in the near future, given the developmental motivation of fishery claims in the Third World (pp. 278-80). The study ends with a concession to the preferential claims of coastal states based on special social and economic needs but with an expression of fear that the jurisdictional issue will be resolved at UNCLOS III by

the confirmation of "status zones" extending far beyond twelve miles rather than by the development of resource management regimes based on the concept of "functional authority."

All three of these works underline the importance of Latin American contributions to the development of law of the sea doctrine and practice, although they differ widely in their attitude. Given the distinctiveness of Latin American approaches to these issues since World War II and the enormous influence they have had on developments at the global level, it is not surprising that a very considerable volume of law of the sea literature is now emerging from that region in English.¹⁵ But even more important, current exercises in conference diplomacy such as UNCLOS III seem to be opening up a new kind of literature that focuses on national and regional approaches to problems of international law, especially a genre that may be described as "Third World studies in international law and politics."

Two examples of this genre are contained in the study of ocean research issues edited by Warren S. Wooster. The first article, "The Latin American Position on Legal Aspects of Maritime Jurisdiction and Oceanic Research" by Eduardo Ferrero, reflects the widely held view in that region that a unilateral claim to maritime jurisdiction by the coastal state out to 200-mile limits is sufficient legal foundation for the exercise of "sovereign" rights of control over any kind of scientific research in the area. This argument, endorsed in Resolution 5 of the Lima Declaration, is based on the half-truth that "most of the past rules of international relations have been established by a small number of powerful states in order to favor their own national interests" (p. 108) and on the need for "a new view of international society, formed and governed by the legal positions and political acts and interests of all the nations, not necessarily only by a small number of powerful states" (pp. 121-22). Like many other Third World advocates of a "new international economic order," Ferrero rejects the four 1958 Conventions on the Law of the Sea as evidence of customary law and denies that any general international custom exists to support a freedom of scientific research within 200 miles of a claimant coastal state. Ferrero's position on the extent of a coastal consent regime is extreme, within the context of the UNCLOS III debate, but the reader should not be misled into thinking that resort to this kind of militant advocacy is a new development in the literature of the law of the sea. What is new is the *volume* of extremist arguments from Third World sources, apparently motivated in part by the desire to shock the orthodox Western (or Northern) reader into realizing how wide is the gap to be bridged by legal engineers at work in diplomatic forums.

The following chapter in the Wooster collection, "Developing Country Views of Sea Law and Marine Science" by Herman T. Franssen, may also be characterized as a genuine example of "Third World studies," proceeding as it does from the premise that "[w]hat we are facing today is the

¹⁵ For a recent bibliography of Latin American writings on the law of the sea, see A. SZEKELY, BIBLIOGRAPHY ON LATIN AMERICA AND THE LAW OF THE SEA (Law of the Sea Inst., Spec. Pub. No. 5, 1976).

revolt of [the developing] countries against a law of the sea that was developed without their participation through the practice, doctrines, and treaties of European powers and imposed on others during the period of European supremacy and expansion" (pp. 139-40). It recognizes that many developing coastal states regard the extension of maritime jurisdiction over a 200-mile zone as a legitimate and necessary step to remedy an injustice of history and to protect the vulnerable state from harm believed to be associated with foreign scientific research in offshore areas. In a less assertive manner, Franssen succeeds much better than Ferrero in explaining and justifying the case for controls put forward by the developing coastal states. He accurately predicts that other developing countries would be persuaded at UNCLOS III to accept most of the Latin American argument for controls, that the issue of scientific research would receive higher priority as the Conference proceeded, and that the quest for a compromise would encounter serious difficulty because of the arbitrariness in classifying different kinds of research (*e.g.*, "pure" versus "applied").

Coexisting with the emerging field of "Third World studies in international law and politics" is the somewhat older field of "conference diplomacy studies in the law of the sea." These studies, concentrating on the process rather than the product of treaty-making, began in the aftermath of UNCLOS I but on a fairly modest scale, and it is only in recent years that political scientists have been attracted to explore the processes of law of the sea diplomacy in depth. The difficulties involved in this kind of research are formidable, since a sophisticated understanding of the nuances can only be gained by attendance at the Conference sessions and by securing a firm grasp of the many complex legal issues. By accepting an official or semiofficial role in a national delegation or the international Secretariat, the participant-scholar accepts the risk of losing objectivity, or at least the reputation for objectivity; whereas attendance as an independent observer puts the scholar at a disadvantage in his effort to secure access to delegates, to closed sessions, and to documents in limited circulation. The scholar who stays away entirely from the Conference becomes overly dependent on public documents, on word-of-mouth reports from returnees, and most distortive of all, on the reports of the press. There is still much he can do by way of helpful commentary, but he is virtually excluded from the realm of expertise in the field of conference diplomacy studies. Back home he is particularly susceptible to the danger of acquiring a slanted nationalistic viewpoint without realizing it.

In the early years, however, while the Seabed Committee was preparing the way for UNCLOS III and producing a mountainous volume of documentation in the process, it was possible to study conference diplomacy without having to contend with the difficulties that have emerged more recently, now that most of the significant discussion takes place behind closed doors. It was possible, therefore, for Renate Platzöder and Wolfgang Graf Vitzthum to produce a careful study of the issues and the early discussions from a West German viewpoint without having to resort to

"keyhole scholarship." The result is a detailed but rather bland account of the proceedings, somewhat in the manner of a conscientious secretary taking the minutes at a complicated and unruly meeting and knowing that even the best of secretaries has personal views that are bound to color his perception and recollection. In an age accustomed to extravagant indulgence in fiction, the reader of conference diplomacy studies expects to share in the drama of the occasion. He is likely to be disappointed, unreasonably, to find himself deprived of the thrill of revelation, the peeping-Tom excitement of explicit scenes from the world of conference diplomacy. In place of excitement, the Stiftung Wissenschaft und Politik production provides national color in the form of a section on the positions adopted by the West German delegation. To this extent, therefore, the study belongs also to the genre of "national approaches to international law," as well as to the overlapping field of conference diplomacy studies. Like most of the other Western (or Northern) states, the Federal Republic of Germany has undergone fairly substantial pressure at UNCLOS III to modify its conservative views on a number of issues, not only at the urging of developing country delegations but also as a result of the need to reconcile the national interest with the sense of community interest evolving within the delegation of the EEC. The Platzöder-Vitzthum study may, therefore, have a special value as an early contribution to the field of "comparative marine policy studies" in general, and to that of European or EEC marine policy studies in particular.

It is also interesting to speculate that these two authors were motivated by the legitimate hope that scholarly analysis and appraisal in the middle of a complex treatymaking exercise could be helpful to some of the delegations at UNCLOS III, especially to those that were not present at the preparatory stages. During a diplomatic conference of such length and complexity, what roles can and should the academic community take upon itself on behalf of governments that lack sufficient research capability? Since at least one third, and arguably over a half, of the UN membership falls within this category of research-deficient states, the question is of some importance. The problem is, of course, treated within the United Nations through a variety of training and information programs but most of these programs are handicapped by a lack of funds and other internal difficulties. These programs are generally interested in securing the cooperation of academics in providing assistance to member nations in preparing for major conferences, but these matters are often of political delicacy and academics are not always the most sensitive to diplomatic protocol and national pride. It is not fair to evaluate the Platzöder-Vitzthum study from this point of view, because it does not set out to provide assistance to delegations at UNCLOS III and indeed is explicitly directed toward the positions of the Federal Republic of Germany, but the nature and timing of the publication suggest that, with a somewhat different orientation in the later section, this analysis might have been the forerunner of a new kind of research undertaking that seems to be

needed in a period of divisive and technically demanding conferences, when academic international lawyers can be useful during as well as after the event.

Actualités du droit de la mer is the title of the proceedings of the Montpellier Colloquium on the Law of the Sea held in 1972 under the auspices of the Société Française pour le Droit International. Like most of the other works reviewed here, this collection of papers was put together before UNCLOS III proper was convened at Caracas in the spring of 1974. The participants included most of France's academic specialists in the law of the sea and a few guests from other countries. In the first session, the introductory addresses led to a discussion characterized by a kind of scholasticism foreign to law of the sea specialists in North America. For example, two of the participants debated whether the original concept of the freedom of the seas was "essentially" the freedom of navigation or was a broader conception incorporating other freedoms such as the freedom of fishing. Readers of this *Journal* may be especially interested in Professor Jacques-Yvan Morin's intervention, justifying the Canadian Government's unilateral acts in the context of fishery rights and pollution control (pp. 102-03), remarks to a French audience which are similar in many respects to those made to U.S. audiences by anglophone colleagues.¹⁶ Morin's remarks at Montpellier produced a very different, much more metaphysical, kind of response; namely, that unilateral acts are facts, and facts are not capable of having a normative value. ("An economic fact can certainly have an influence on the orientation of legal rules; it can influence their genesis and even their interpretation, for sure. To go on and argue that a fact itself can have a normative value, that is an abyss that seems difficult to cross" (p. 106).)

Perhaps a more modern example of French scholarship is found in the paper by René-Jean Dupuy and Alain Picquemat, who combine a sense of actual decisionmaking in the world community through a balancing of interests with a structural approach to conceptualization. One may wish to quarrel with their description of extensive jurisdictional claims as "appropriations," but they provide an interesting three-fold classification of limitations on such acquisitive claims: (1) factual limitations (landlocked states); (2) moral limitations (the common heritage of mankind); and (3) juridical limitations (the regulated freedom of the sea). In commenting on the third of these, the authors take the position that the freedom of the sea will mean very little to developing countries if it rests only on a theoretical equality of opportunity. As their fellow countryman Georges Scelle emphasized, juridical progress goes beyond the proclamation of rights to the securing, as far as possible, of compensation for inequalities of fact (p. 155).

One of the favorite topics for dissertations and scholarly monographs in recent years is the problem of the deep ocean floor. The monograph by Dr. Wolfgang Graf Vitzthum is the product both of German and

¹⁶ PROC., ASIL, 64 AJIL 52 (No. 4, 1970).

American influences: Pardo, Borghese, Friedmann, von Simson, and Kaiser. Despite its title ("The Legal Status of the Ocean Floor") this work belongs to the "new" literature by ranging far beyond legal doctrine into the science, technology, and economics of deep ocean mining, though the central part consists of a rather formidable analysis of the *lex lata*, first with respect to jurisdictional issues, then with respect to the uses of the ocean floor. The last section deals with proposals made at the UN Seabed Committee, and it is of course this part that seems most outmoded by recent developments at UNCLOS III. Because of the timing of publication, it was difficult for the author to discuss the critical questions regarding the power and composition of the various organs that would make up the proposed International Seabed Authority.

Another kind of literature, which might be described as the "comparative study of international marine organization," is represented in the Koers study of regional fisheries organizations. Other writers have developed this field over a period of almost 20 years,¹⁷ but this is the most extensive description of existing institutional arrangements so far presented. The question it provokes is whether it is based on an overestimation of the future role of regional commissions in the next phase of experimentation in ocean management.¹⁸ Given the trend toward vast extensions of coastal state jurisdiction and amplified national fishery management programs, it is possible that this field will be taken over in the years ahead by specialists in public administration, with a resulting shift in emphasis from the structure of international authority to the process of decisionmaking within national bureaucracies.¹⁹ Presumably this change to national management of marine resources would produce, in the fullness of time, the need for a literature on the "comparative study of marine legislation and administration." On the whole, Koers takes a more sanguine view of the past record and future role of regional fishery organizations than is currently fashionable among most commentators from the developing world, and to that extent he will be regarded by them as an "internationalist" or "idealist" of the Western (or Northern) school. Koers does recognize some of the inadequacies of the existing commissions but, instead of recommending that they be "relegated" to the role of servicing the appropriate national

¹⁷ Early examples of "institutional" studies of this kind were F. T. CHRISTY, JR., & A. SCOTT, *THE COMMON WEALTH IN OCEAN FISHERIES* (1965); D. M. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* (1965); and H. KASAHARA & W. BURKE, *INTERNATIONAL FISHERY MANAGEMENT IN THE NORTH PACIFIC: PRESENT AND FUTURE* (1972).

¹⁸ See Resources for the Future Program of International Studies of Fishery Arrangements, Paper Series (1973-75); and Christy, *Disparate Fisheries: Problems for the Law of the Sea Conference and Beyond*, 1 OCEAN DEVEL. AND INT. LAW 337 (1974). There is a subset of the same literature which proceeds from the premise that the level or structure of fishery authority may be less important than the management principles to be implemented. E.g., *THE FUTURE OF INTERNATIONAL FISHERY MANAGEMENT* (H. Gary Knight, ed. 1975).

¹⁹ In some degree the existing literature on coastal zone management represents the first evidence of this aspect of "law of the sea" literature, although it overlaps considerably with land use planning studies and related areas of research.

agencies of the coastal state, as the supporters of an "economic zone" would contend, he proposes that they be brought within a larger system of international authority which would include at the global level a "world marine fisheries organization." Though outside the mainstream of the present debate, this is a work that national administrators will surely need to refer to in the years ahead, as they learn the importance of "harmonizing" management policies and provisions at all three levels of fishery organization.

The final work reviewed here, the study of global marine attributes by Gamble, provides shock therapy for the reader who assumes that the law of the sea is still just a compartment of public international law. What the author undertakes is to apply 35 characteristics or attributes to some 150 independent countries in order to demonstrate the relationships between these countries and the marine environment. The attributes chosen pertain to such matters as area, population, GNP, shore length, breadth of continental shelf, fish catch, fleet size, sea trade, offshore oil activity, membership in marine organization, acceptance of marine conventions, and so on. The emphasis is placed on hard data, so as to reduce implied value judgments to the minimum. What emerges from these tabulations is a profile of the "national marine interest" of each country for purposes of comparison and classification. National rankings have already been attempted by a number of writers in order to provide a basis for predicting trends at UNCLOS III and subsequent decisions,²⁰ and social scientists are likely to continue using techniques of this kind in order to further conflict resolution studies applied to marine resources. Geographers and others are also interested in the use of such data to clarify what constitutes a "natural" marine region for purposes of cooperation in international trade and diplomacy.²¹ Indices of marine national interest will surely be necessary, though not sufficient, to enable the international lawyer to discern the most likely pattern of regionalization in the international law of the sea, if UNCLOS III fails to achieve universal uniformity in this area of normative development.

In conclusion, international events such as UNCLOS III are transforming the relationship between government and academic specialists in international law. In most countries, though not necessarily the United States, the universities are becoming more dependent on the cooperation and financial support of government for their research and conference activities,

²⁰ For examples of "empirical" analyses of this kind, see Alexander, *Indices of National Interest in the Oceans*, 1 OCEAN DEVEL. AND INT. LAW 21 (1973); D. M. JOHNSTON & E. GOLD, *THE ECONOMIC ZONE IN THE LAW OF THE SEA: SURVEY, ANALYSIS AND APPRAISAL OF CURRENT TRENDS* (Law of the Sea Institute, Occas. Paper Series, No. 17, 1973); and Shyam, *Rights of the Coastal States to Fisheries Resources in the Economic Zone: An Empirical Analysis of State Preferences*, 3 OCEAN MANAGEMENT 1 (1976). Another approach to predictive analysis is that of content analysis, e.g., Friedheim & Kadane, *Quantitative Content Analysis of the United Nations Seabed Debate: Methodology and a Continental Shelf Case Study*, 24 INT. ORGAN. 479 (1970).

²¹ See, e.g., Alexander, *Regionalism and the Law of the Sea: The Case of Semi-enclosed Seas*, 2 OCEAN DEVEL. AND INT. LAW 151 (1974).

just as government officials in policy planning are themselves assuming a more academic lifestyle characterized by frequent participation in interdisciplinary and interdepartmental seminars and workshops, with or without fellow specialists from the academic community. The literary expansion and diversification already resulting from this transformation is likely to be of enormous significance for publisher and librarian as well as the student and practitioner of international law.

DOUGLAS M. JOHNSTON

The International Court of Justice. An Analysis of a Failure. By John King Gamble, Jr. and Dana D. Fischer. Lexington, Mass., Toronto, and London: Lexington Books, D. C. Heath & Co., 1976. Pp. xiii, 157. Index. \$15.00.

Gamble and Fischer are political scientists who share the opinion that those who would reform the International Court of Justice have failed to build their arguments upon a firm factual basis. Their purpose is to establish such a basis or at least to help develop a model by which one can discern "exactly what the Court has done, how countries relate to it and ultimately what role it can be expected to play in the future" (p. 5).

By *factual*, it should be noted, the authors have in mind the organized accumulation of empirical data. The worth of their achievement consequently ought to be judged primarily in terms of the data that they have compiled and the methodology that they are seeking to refine for the purpose of interpreting the data, as well as their own interpretation of the data's significance. The difficulty any such assessment presents is, however, that the authors have explicitly chosen to eschew what they condescendingly refer to as "legal analysis"—which is to say, not only doctrinal analysis, exegesis of the rhythm and cognitive maneuvering of judicial logic and its communication to target audiences, and an inspection of the choices of premise and preference such maneuvering inherently involves, but also any detailed reference to the institutional context in which the Court operates. What is left, in the authors' view, is "a basically new approach for assessing the work of the Court" (p. 31).

That it may be, although one feels obliged to observe that novelty and improvement are not invariably synonymous. It would be more accurate, perhaps, to suggest that theirs represents an ambitious attempt to cleanse "raw" data about the Court of any substantive interpretation or other additives which might disguise the essential flavor of the data. Unfortunately, as others who have studied the Court have learned, the desired purification is difficult to achieve if one is not first aware that one is seldom, if ever, dealing with truly "raw" data. That is, the significance one attaches to certain recurring fact patterns or to the identification of one or another aspect of these as "primary legal" questions or "underlying" issues or even to the association of certain decisions with others in categories depends upon some predetermination that particular data arranged in certain ways are more significant than other data or other arrangements. Gamble and Fischer, for example, without examining their

implicit assumptions, divide the "legal issues" the Court has dealt with into such arbitrary categories as "territorial," "jurisdiction and/or control over property," "responsibility for acts," "jurisdiction and/or control over persons," and "interpretation of treaties" (p. 41). In political terms, the categories are "East-West, decolonization, control over natural resources/environmental concerns, and peripheral and/or localized." Similarly, outcomes of the Court's advisory opinions are listed (Table 3-13) on the basis of whether they "helped settle" a dispute, were "irrelevant and/or inconsequential," or were "harmful." Such, in any case, is the conceptual mold in which the "new approach" is cast.

The latter part of the book presents a compilation and correlation of selected data pointing to how "countries" actually relate to the Court. Countries, of course, are abstract classifications of groups of people who possess at least territorial affinity. Some theory holds that patterns of behavior may be discerned which make the reactions of certain national elites predictable. This unidentified premise underlies the methodology Gamble and Fischer use, which is to correlate a set of eighteen pieces of information about individual nation-states with some undifferentiated evidence of actual "contact" the formal representatives of these states have had with the Court. The information here accumulated is a curiously mixed bag, including both statistics of national geopolitical characteristics and "attributes of international activity" (p. 79). Among the former are population, area, GNP, shoreline length, and literacy rate, while among the latter are accession to treaties containing dispute settlement clauses, membership in certain selected international organizations, an arbitrary estimate of the degree of a state's acceptance of the compulsory jurisdiction of the Court, and a naively construed category described as counting the number of times a state has "appeared" in contentious proceedings resulting in judgments, whether or not on the merits (Table 4-1, p. 80).

The work concludes with a proposed model for predicting use of the Court. Its not unreasonable premise is that the chances of a case's reaching the Court are best understood in terms of the timing of the dispute, the parties to it, the types of issues involved, the "treaty characteristics" of the parties, etc. (p. 117). The current need for such a model is not immediately apparent.

The distinguished company which Gamble and Fischer join in writing about the Court demands a level of scholarship considerably greater than their efforts in this case evince. An introductory chapter purporting to review existing literature about the Court is replete with secondary source quotations and interpretations of readily available works. Moreover, even accepting the notion that what is offered is merely a survey designed to establish the failure of Court reformers to build their arguments upon an empirical basis, omissions of prominent studies are so frequent as to draw into question the authors' familiarity with the wealth of scholarship the international adjudicative process has empirically attracted.

EDWARD GORDON

Toetsing van Overheidshandelen door de Nationale en Internationale Rechter en het Vereiste van een Procesbelang. By P. van Dijk. Groningen: H. D. Tjeenk Willink bv, 1976. Pp. xxiv, 529. Index. F. 68, 50.

This excellent comparative law study examines the requirements for standing to sue in connection with proceedings for judicial review of administrative acts in national and international tribunals. In a preliminary review of procedural concepts, the author distinguishes between proceedings for the enforcement of legal rights (*contentieux subjectif*) and those for the maintenance of the legal order in general in the public interest (*contentieux objectif*) (p. 8), and between conditions relating to the jurisdiction of the court (*compétence, Zuständigkeit*) and those relating to the admissibility of the claim presented (*recevabilité, Zulässigkeit*) (pp. 10-12). He regards the interest sufficing to confer standing to sue (*procesbelang*) as falling within the latter category (p. 17); hence it need not be treated so strictly as jurisdictional requirement would be. The author then reviews English, U.S. federal, French, and German law as to requirements for standing. This is followed by a similar analysis of the European Communities (Coal and Steel, Common Market, and Atomic Energy) as well as of the European Convention on Human Rights, and of the International Court of Justice.

All tribunals fear the flood of litigation which might follow if an *actio popularis* were permitted, and if any individual were permitted to act as a "private attorney general" to vindicate any breach of the legal order by an administrative agency. But many treaties do authorize signatories or members of international organizations to bring suit in the general public interest regardless of whether the alleged violation of law directly affects their own interests or that of their nationals.

The author notes, however, that the state is not the best representative of the general public interest, because political expediency and national policy may inhibit wholehearted vindication of the rule of law (p. 325). Hence he would favor the creation of an independent international agency to bring suit in the public interest. He also favors liberal interpretation of existing provisions. Such extension of the scope of judicial scrutiny of the actions of governmental agencies is in keeping with the policy, characteristic of a *Rechtsstaat* dedicated to the rule of law, that judicial protection of legally protected interests should be maximized (pp. 97, 320).

A 15-page summary in English adds to the general usefulness of the volume, which is conveniently readable although published by a process reproducing typescript without justification of the right-hand margin.

EDWARD DUMBAULD

The Natural Law Tradition and the Theory of International Relations. By E. B. F. Midgley. New York: Barnes & Noble, 1975. Pp. xx, 588. Index. \$23.50.

Current criticism of the Westphalia system of international relations is heavily dependent upon historical and sociological analyses. There is a

need for greater understanding of the theoretical justifications which have been advanced in defense of state sovereignty as an ultimate principle of order. Major jurists such as Grotius, Pufendorf, and Wolff had recourse to natural law, and it is important to understand how their conceptions compare with the tradition traceable to the medieval synthesis of St. Thomas Aquinas. This book, written from the position of orthodox Thomism, contributes to that end. It traces the theocentric view of human nature and natural law developed by Aquinas in the thirteenth century, its gradual erosion in later scholasticism, and the radical departures of seventeenth and eighteenth century rationalism. These modern versions of natural law provided intellectual support to the emerging ideal of self-sufficient, autonomous states. Later developments, from Kant and Hegel to positive sociology and cybernetics, are also examined from the vantage point of the perennial philosophy.

The author carefully explains the Thomistic understanding of a unitary human nature, and the interactions of intellect and will which underlie comprehension of the moral law. The natural tendency towards political organization which, as a dynamism of nature, should provide an impetus towards the development of global authority is emphasized. These ideas are effectively contrasted with the later contractarian views of society and subjective interpretations of moral right. The present work also provides a deeper understanding of the insufficiencies of Grotius' humanistic theory of natural law, which sought to establish juridical relationships among nations without the institution of political authority.

Midgely is uncompromising in his view that an authentic understanding of natural law is bound up with the theology of the Catholic Church and its teaching authority or *magisterium*. However, he surpasses official teaching on one central issue. The Second Vatican Council had condemned acts of war aimed at indiscriminate destruction of entire cities or other extensive areas, but its position on the possession of nuclear weapons was ambivalent. Starting from the principle that direct and deliberate killing of the innocent is contrary to right reason, the author argues that the present nuclear policies of states possessing such weapons are immoral, since they all include a conditional intention to attack populated cities. The argument includes a critique of the works of strategists such as Kahn and Schelling, and an evaluation of the policy of the United States from 1962 to the Ford Administration.

The problem of just offensive war is an overriding concern; unfortunately, the manner of its presentation upsets the general balance of the book. Frequent shifts from the theoretical to the concrete level of discourse prevent the reader from concentrating upon the speculative development of natural law. He is drawn to consider simultaneously the specific issue of licit warfare.

At certain junctures, the abstract rigor of Midgely's thought moves too far away from present international developments. The possibility of just offensive war is fairly, but inconclusively, examined. Greater attention should have been given to the contemporary understanding of aggression

and the obligation of states to make use of existing institutional mechanisms for peaceful settlement.

CORNELIUS F. MURPHY, JR.

The OAU and the UN: Relations between the Organization of African Unity and the United Nations. By Berhanykun Andemicael. Unitar Regional Study No. 2. New York and London: Africana Publishing Co., 1976. Pp. xx, 331. Index. \$27.50.

Through access to OAU documentation¹ notoriously inaccessible even to UN officials, the author offers valuable insights into the evolution of this African regional organization, thereby usefully complementing the studies of El Ayouty, Boutros Ghali, Cervenka, Elias, Markakis, Nye, and Thompson.

Established to maintain peace and unity on the continent of Africa, to free that continent from all vestiges of colonialism, and to assure Africa a more effective voice in world affairs, the OAU has, nevertheless, largely failed to attain any of those objectives. In this context the author is concerned with the "try OAU first" application of Article 52(2) of the UN Charter for the peaceful settlement of African disputes (Chapter III) and with OAU enforcement actions against regimes in Southern Africa, requiring prior authorization of the Security Council (Article 53(1)).

These problems have, however, remained largely theoretical due to the inability or disinclination of the OAU to face either of these challenges. In the area of pacific settlement, it has preferred to stand aside from disputes between member states on the theory that "African solidarity may be threatened more by an active involvement of the OAU in intermember disputes than by a modest role" (p. 58). Its Commission of Mediation, Conciliation and Arbitration has never been activated. Instead, mediation efforts by African Heads of State assisted by *ad hoc* commissions have been undertaken with but limited success. The OAU has refrained from intervening in the disputes involving Ethiopia, Kenya, and Somalia and has left to the United Nations the problems of the Djibouti Territory and Spanish Sahara (pp. 54, 58 ff).

Likewise, the problem of prior authorization by the Security Council for regional enforcement actions has not arisen. The United Nations with its Committee of Twenty-Four has preempted the field in respect of Southern Rhodesia, as it has with regard to the former Portuguese territories, Namibia, and Apartheid (pp. 109-55). Nor has the OAU been able to force its members to apply sanctions against Southern Rhodesia and South Africa. The author summarizes the situation as follows:

... the OAU is distinguished from defense alliances such as the North Atlantic Treaty Organization (NATO) and the Warsaw Pact by its role as agent for resolving conflicts and disputes among its own Member States. But in contrast to the OAS which, according to Article 7 of the Inter-American Treaty of Reciprocal Assistance, is required to

¹ An unpardonable indifference to typographical errors has included, in a few instances, erroneous citations of those documents.

take all necessary measures to re-establish or maintain peace and security between two or more Members of the OAS, or the League of Arab States which has power under Article 6 of its pact to determine measures necessary to repulse aggression by any State against a Member State, the OAU is entrusted with no disciplinary power over any offending Member (p. 15).

Only in its relations with the ECA has the OAU sought to claim priority over UN activity. Here the rivalry appears to have been largely resolved in favor of the ECA (Chapters VIII-X).

A revision of the OAU Charter rather than various administrative expedients (Chapters V and XI) would appear to be required if the OAU is to make a larger contribution to the work of the United Nations. Otherwise representing the largest group in the UN General Assembly, the African states will continue to prefer that body to their own regional organization.

JOHN H. SPENCER

World Fisheries Policy. Multidisciplinary Views. Edited by Brian J. Rothschild. Seattle and London: University of Washington Press, 1973. Pp. xix, 272. Index. \$9.50.

This volume, consisting of 259 pages of actual text, contains sixteen essays written by well-known economists, biologists, government officials, and at least one legal scholar specializing in the problems of fisheries. It is the fourth publication in the series on Public Policy Issues in Resource Management sponsored by the Graduate School of Public Affairs of the University of Washington and the second book in that series devoted exclusively to fisheries. It is the product of an effort to compile an inventory of the political, social, economic, managerial, and eco-biological problems relating to fisheries and of the various options for their solution, as they appeared on the eve of the Third Conference on the Law of the Sea. It was designed to serve as a source of guidance for the negotiators.

Collections of learned papers are often merely a parade of scholars or their views and fail as an organized and progressive discussion of a central theme. The result is confusion, repetition and lack of readability. As the Introduction by the editor reveals, the volume under review fortunately was planned with the idea of a functionally arranged identification of the major facets of an effective and workable modern fisheries policy. It therefore avoids the usual pitfalls of symposia. The contributions deal with a wide array of fisheries-related subjects ranging from the ascertainment of international and national needs and goals to the utility and shortcomings of biological or economic methods and techniques. Yet despite the evident effort at coherence, the final product still is more an anthology than a monograph and makes difficult reading.

The particular value of the book for the international lawyer today, after the emergence of the Revised Single Negotiating Text of the Conference on the Law of the Sea, is its utility as a key to the understanding

and assessment of the new legal regime for fisheries, embodied in Articles 50-61, and 104-108 of the instrument. For example, as the Conference has shown preference for what Dayton L. Anderson's paper on Science and Fisheries Management calls the ecological approach (RSNT Arts. 52, 53, 55, 56, and 104(b)), his brief summary on the relative advantages of that scheme will be of interest. Similarly the RSNT's long and involved formula for the international standards of conservation measures, defined as "measures designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing countries, and taking into account fishing patterns, the interdependence of stocks and generally recommended subregional, regional and global minimum standards" (Art. 50(3) and 107(1)(a)) will gain life and meaning in the light of the series of papers that deal with the political, economic, and eco-biological problems of conservation and allocation of the fishery resources.

It would be tedious and redundant to summarize the content or virtue of each of the papers. The editor himself has done so in his Introduction. All that needs to be said here is that a multidisciplinary approach to a multidimensional problem such as the international regulation of fisheries is not only meritorious but practically indispensable.

STEFAN A. RIESENFELD

The Vietnam War and International Law. Edited by Richard A. Falk. Volume 4, *The Concluding Phase*. Princeton: University of Princeton Press, 1976. Pp. xiv, 1051. Index. \$35.00, cloth; \$13.50 paper.

This substantial volume, dedicated to the memory of Wolfgang Friedmann, concludes the massive collection, nearly 4,000 pages, edited by Richard Falk and sponsored by the American Society of International Law. The production of the final volume involved coping with the sudden demise of the Saigon regime early in 1975; a special supplement covers these events. Like its predecessors the collection is a symposium of articles and verbatim records of discussions, together with extensive documentary appendices.

As the war expanded geographically and as the internal American ramifications grew, the themes of the collection have multiplied, though remaining cohesive in that each theme has interacted with the others. The principal themes in the latest collection are: the role of international law in American foreign policy, the relation between the war in Indochina and the United Nations, a variety of problems concerning the law of war (the interpretation of the Geneva Protocol on Gas and Bacteriological Warfare, cluster bombs, environmental warfare, air warfare, the repatriation of prisoners during hostilities, war crimes), the Paris Agreements of 1973, and the constitutional problems concerning the war powers of the President.

Much of the material, including documentation, is of first importance to the lawyer, *e.g.*, the monographic study by John Norton Moore on the Geneva Protocol of 1925, first published in the *Virginia Law Review*. However, it would be a gross error for those who tend to classify books by title to characterize this volume as a book primarily or exclusively for international lawyers. A high proportion of the contributions are concerned with matters that are fundamental in the widest possible terms of government, constitutions, and decisionmaking. The recurring theme is the question of constitutional responsibility and practice in the United States in the matter of the external use of force. This theme has both its "internal" or constitutional aspect and also raises questions concerning access to considerations of international law by the decisionmakers, especially the National Security Council. This latter question is explored by John Norton Moore in an article in *Foreign Affairs* (1973, p. 408) which is the first item in this collection. It deserves a wide audience.

The contributions are nearly all meaty and well reasoned in spite of the strong feelings lying behind the technical and specific issues. There are many insights of the first importance. For example, Edwin Brown Firmage (p. 35) notes a connection between a government's compliance with its own laws and its behavior toward other states. No doubt there is no simple explanation of the Watergate phenomenon which has bred some strange theses, including a Soviet view that it was a right-wing plot against detente. A likely explanation is that the intelligence and special operations people eventually took the logical view that what had been regarded as sound national policy in dealing with Moussadek *et al.* should be acceptable in dealing with recalcitrants at home. The new maxim is that legality is indivisible.

The general significance of the volume is obvious enough, since all of us are affected by decisionmaking in Washington. The operational navigation charts of the U.S. Air Force span the world. But aside from such considerations, the issues of Vietnam have universal significance. The technology of the new air warfare is available to many governments. Nationalism, a constantly underrated force, is also a theme of this book. Vietnamese nationalism has sent a variety of reverberations through the American political structure.

IAN BROWNLIE

Kernenergie und internationale Politik. Edited by Karl Kaiser and Beate Lindemann. Munich and Vienna: R. Oldenbourg Verlag, 1975. Pp. 476. Index. DM 60.

This volume constitutes the product of a panel of German officials and scholars, meeting from early 1973 to the summer of 1974 under the auspices of the Forschungsinstitut der Deutschen Gesellschaft für Auswärtige Politik, to discuss the implications, particularly for Germany, of the international aspects of the peaceful uses of nuclear energy. Its scope is best indicated by the titles of the individual studies, which were written by

different participants, though the drafts were discussed by the entire group: the energy situation as parameter for conflicts (Lantzke); the historical development of the peaceful uses of nuclear energy (Häfele); the misuse of nuclear energy—defining the concept (Ungerer); principal developments in the field of industrial uses of nuclear energy (Lorenzen); the conventionalization of nuclear energy and the mutation of nonproliferation policy—distribution and control as sources of political conflict (Nerlich); the role of international organizations in preventing the misuse of nuclear energy (Ungerer); the safety of nuclear facilities as a source of international conflict (Schnurer, Breest); liability for nuclear damage (Boulanger); radiation protection as a task of environmental protection in relation to the civil uses of nuclear energy (Aurand); atomic energy, environmental protection, and international conflicts—the prospect (Menke-Glückert); the distribution of fissionable materials: the problem of raw materials and enrichment (Oboussier); multinational technical assistance in the field of nuclear energy (Schultze-Kraft); the significance and influence of information in the field of nuclear energy (Brée); peaceful nuclear explosions as a challenge and task of international organizations (von Welck); nuclear energy and international organizations (Lindemann); the policy of the Federal Republic of Germany concerning the peaceful uses of nuclear energy (Kaiser).

These studies leave no corner of the subject unilluminated. Like most panel products they reflect some unevenness in style, approach, and treatment and suffer from a slight lack of integration; nor do certain of the essays fully avoid a particular danger of this type of book production—an implicit assumption that the lay reader will understand allusions addressed more to other participating experts. The compensation is of course a greater breadth of expertise than can be marshalled by individual scholars. As in many German scholarly works, several of the contributions display a surfeit of generalization and philosophizing unsupported by specific references to particular legal incidents and instruments. Thus, with a few exceptions (*e.g.*, Boulanger), the work is more valuable to political scientists than to international or nuclear lawyers. The former should be well rewarded by the thorough coverage of almost every relevant question but might deplore the general homogeneity of views. Not one of the authors opposes or even expresses serious reservations concerning the rapid development of nuclear power, subject to certain feasible improvements in safety and safeguards controls. Thus the tension and indeed passion that characterizes much recent writing on this subject is entirely missing, perhaps reflecting as much the quasi-official sponsorship of this project as its completion before the antinuclear movement had fully developed in Germany, and before its government and industry became embroiled in the dispute concerning the agreement with Brazil. Thus, like most works in any fast developing field, early obsolescence is a risk, but for the same reason frequent studies of this type are needed to enable those not directly involved to stay abreast of developments.

PAUL C. SZASZ

Katzarov's Manual on Industrial Property All Over the World. 8th Edition prepared by A. Reverdin, Prof. Konstantin Katzarov, S. A. Vol. I: International Conventions, Western Europe, Eastern Europe, Pp. xvi, 803. Vol. II: North and Latin America, Asia, Africa, Oceania. Pp. 663. Geneva: Konst. Katzarov, S.A., 1976.

Annual of Industrial Property Law, 1975. Edited by John Warden. London: Shepherd-Walwyn; New York: International Publications Service, Collings, Inc., 1975. Pp. xvi, 512. \$40.

The two books under review are addressed to different purposes yet they are both witnesses to the growing recognition that technology is basic to economic development and that the increasing transfers of technology from country to country call for the availability of reliable up-to-date information on international industrial property agreements and on individual country laws and regulations in that field.

The first of these books, as its title implies, provides encyclopedic information, whereas the second, as its title likewise implies, is the 1975 volume of what is planned as a year-by-year "digest of the main alterations, developments and trends in industrial property legislation, jurisprudence and practice in each country." Both books cover patents, trademarks and models and designs, and in some few instances, copyright and trade secrets. The *Annual*, to the extent that it covers some of the same countries, demonstrates the practical application of the laws summarized in the *Manual*.

The *Manual* is to be reedited at five year intervals. One would feel safer using the *Manual* had all the country statements contained such remarks as are under West Germany: "The aforesaid summary . . . was completed on December 27, 1974." Also, the usefulness of the *Manual* would be enhanced by adopting uniform and accurate references to international agreements cited for each country, with, where called for, mention of the version or versions to which the country is a party. To cite but two examples, the Convention for the Protection of Industrial Property signed at Paris on March 2, 1883, as revised, is referred to in about six different ways, and under Belgium we find: "the European convention of Strasbourg concerning formalities prescribed for patent applications, signed in Paris on 11th December, 1953."

This 8th edition of the *Manual* has been enlarged from 1200 to approximately 1500 pages. It was prepared with the collaboration of 90 authors located in 152 countries. The total number of independent states is given as 185, as of 1975.

The *Manual* contains texts of industrial property conventions and other international agreements, with brief analyses, and summaries of individual country legislation and practice under a more or less uniform topic pattern. The reader is given such essential information as filing requirements, exceptions to protection, kinds of protection (principal and additional patents), and prosecution procedure. Another important feature of the *Manual*, in these times of regional arrangements and the appearance of new independent states, is the attention which is given to statements about industrial property law systems under such arrangements and in such states.

An introductory statement written by Geoffrey C. Webster, Attorney at Law and Patent Agent, Pretoria, Republic of South Africa, precedes the discussion of the laws of the various African states. At the time of writing, thirty-two of the countries had their own industrial property legislation. In view of the efforts by developing countries in recent years to obtain juridical equality among states with respect to industrial property, it is a little surprising to read that "industrial property legislation comes low on the list of priorities amongst the numerous problems to be contended with in developing countries." Recognition is, however, given to the fact that the subject has received enlightened treatment in a group of former French colonies which, under the Libreville agreement of September 13, 1962, established the Office Africain et Malagache de la Propriete Industrielle (OAMPI). A single registration at the OAMPI confers patent, trademark, or design protection in all the member countries, and common legislation has been adopted.

The *Manual* gives some coverage to the transfer of technology. For example, it gives a partial text of Decision 24 of the Cartagena Agreement on the importation of technology and discusses Peruvian implementing legislation. Another, rather extensive discussion of transfer of technology is given under Spain.

An introductory statement to the division of the *Manual* on Eastern Europe notes that, in view of the fact that the economic structure of the countries of that area was still relatively undeveloped at the time they adopted Western type legislation, that step often proved to be premature and hasty. After World War II, in an effort to encourage the inventive spirit which had been less developed, governments adopted legislation which took a different path. A new type of protection known as the "certificate of authorship," which exists alongside patents of invention, was established; and there was a substantial extension of protection to new categories of invention—improvements or innovations, the rationalization of processes or known methods, and, finally, discoveries. In the trademark field legislative modifications did not actually make for fundamental differences from Western laws.

Finally, some states have no laws protecting patents. This is true of the People's Republic of China (it does have trademark registration, however), Saudi Arabia, and the United Arab Emirates. In these latter two states the publication of a cautionary "Notice of Ownership" in the local newspapers is recommended in order to "warn the public against any possible infringement."

The *Annual*, which will be published each year, can to some extent be a means of filling the *Manual's* five year gap. The *Annual's* country coverage is, however, extremely limited compared with that of the *Manual*. It includes only Australia and New Zealand (mostly Australia), Canada, France, Germany (Federal Republic of), Japan, South Africa, and the United States of America, though more countries may be added in the future. (It also contains an "International" [European] section which

includes a digest of decisions of the Court of Justice of the European Communities.)

The *Annual's* digests and scholarly articles on new developments furnish the opportunity for comparative studies of particular topics and contain much useful advice for the practitioner. For instance, the question whether programs for data processing machines are patentable, the subject of much debate, is touched on in the chapters on Canada, West Germany, and the United States.

Both the *Manual* and the *Annual* are valuable handbooks and useful guides to the primary sources.

KATHERINE DREW HALLGARTEN

Mezhdunarodnaia zashchita prav cheloveka (International Protection of Human Rights) By V. A. Kartashkin. Moscow: Izdatel'stvo Mezhdunarodnye Otnosheniia, 1976. Pp. 223. 75 kopeks.

Dr. V. A. Kartashkin of the Institute of State and Law of the USSR Academy of Sciences draws upon his experience as a member of the Human Rights Division of the UN Secretariat in his review of human rights problems in international law. His principal conclusions are two: The United Nations provides the only acceptable vehicle for the protection of human rights in a world of sovereign states, and its structure needs reformation to avoid overlapping and unnecessary expense.

The first conclusion is argued from the proposition that individual claims to redress of grievances have no place in international law. The individual is not a subject of international law, and, if he were, or if his grievances were to be pressed by a state, there would be a violation of Article 2, paragraph 7 of the UN Charter as an intervention in the internal affairs of states.

Dr. Kartashkin argues that the struggle to protect human rights should focus on overcoming broad policies of aggression, fascism, colonialism, genocide, apartheid, and racism. When such policies are followed, they should be attacked through the United Nations, presumably by resolution of the General Assembly, rather than through individual state action.

As to structures appropriate to the process of protection: Dr. Kartashkin indicates total opposition to any superstate agency inside or outside the United Nations. He will not have a UN prosecutor, for not only might he become a superstate official, but he would concentrate in one person the power which under UN principles must be spread over the entire membership. Dr. Kartashkin will have none of the plans for radical restructuring, such as Louis Sohn's proposal to create within the United Nations a Council for Human Rights directly responsible to the Secretary-General and to reconstitute the General Assembly's Third Committee into a Human Rights Committee alongside a Human Rights Assembly composed of members of parliaments of various states. In Dr. Kartashkin's view the human rights problem is already scattered among too many United Nations organs. To rationalize the structure he would constitute the existing Human Rights Commission as the sole agency authorized to consider policy,

and he would improve the present Third Committee so that it would discuss fundamental question of human rights. He would have the Human Rights Commission meet once every two years to discuss only fundamental problems and thus indicate that it was not concerned with details.

The argument for protection of human rights through review of claims of individuals is not enhanced in Dr. Kartashkin's view by reference to the experience of the European Community. He notes that the Commission at Strasbourg rejects nearly all complaints and the Court does almost nothing. In his view the system is sterile.

The monograph is a strong brief for the longstanding Soviet position that international human rights protection cannot concern individuals and that only domestic courts have a right to hear their complaints. The Soviet diplomats have found the United Nations a congenial system for the discussion of human rights, especially since its majority has changed with the admission of great numbers of new states. It has proven itself to be a useful tribune for attacks on apartheid and unequal treatment of women. It should not go beyond the general situation.

American scholars and politicians sometimes feel as strongly about international intervention in internal affairs as does Dr. Kartashkin, but there are increasing numbers, even in high places, who believe that the time has come to speak boldly in defense of human rights on the basis of the mistreatment of specific individuals. In some measure this attitude reflects the American constitutionalist's view that general issues escape notice unless they are raised by individual complaints. Americans see the school segregation issue left unruffled until little Miss Brown brought her suit against the Board of Education.

Dr. Kartashkin's book will help foreigners to appreciate how strongly opposed to the individualist approach Soviet policy makers are. Soviet attitudes may change, but such change seems unlikely so long as Soviet leaders feel that, in spite of growing majorities in the United Nations which favor the Soviet position, there are individual states which are still hostile and think it to their advantage to attack the Soviet image through the human rights issue.

JOHN N. HAZARD

Kodeks Prawa Traktatów (Code of the Law of Treaties). By Stanislaw E. Nahlik. Warsaw: Państwowe Wydawnictwo Naukowe, 1976. Pp. 514.

Stanislaw E. Nahlik, professor of international law at the University of Cracow, has written a scholarly report on the debates and decisions of the Vienna Conference on the codification of the law of treaties (1968-69). The value of the book is enhanced by the fact that Professor Nahlik was a member of the Polish delegation to the Vienna Conference as well as a member of its important Drafting Committee. His comments reflect faithfully the views and proposals of various delegations.

The Convention was approved by 79 affirmative votes, with only France voting against. The delegations of socialist states abstained not because of

their disagreement with the substance of the Convention, but because participation in the Conference had not been universal. They regretted the absence of the German Democratic Republic, which was not invited. This reason for abstention has since disappeared because of the almost universal recognition of the GDR and its admission to the United Nations. Nothing prevents the GDR from acceding now to the Convention. The other reason for abstention by the socialist states was their constant opposition to any obligation to submit disputes on the interpretation or application of international treaties to any obligatory mode of settlement. Nahlik is optimistic regarding the future accession by the socialist countries because he thinks that they could accede with an express reservation regarding the procedure for settling such disputes.

At the time of the book's publication, 47 states had signed the Convention. The Arab states that ratified the Convention made the reservation that their accession to the Convention did not imply recognition of Israel.

Article 52 of the Convention declares invalid those treaties concluded under the threat of, or with the actual use of force. The Soviet delegation could vote for that article because the Convention applies only to future treaties. Otherwise, several treaties imposed by the USSR on its neighbors in 1939-45 would have been retrospectively invalidated. The Soviet delegation never mentioned at the Conference its theory of invalidity of the so-called unequal treaties, imposed by the stronger party on a weaker one. If China had been represented at the Conference by Peking (instead of by Taiwan), it probably would have mentioned this theory which it has been using against the validity of the 19th-century Russian-Chinese treaties on their mutual frontiers.

The Convention contains a limited version of the *clausula rebus sic stantibus*, namely, if the existence of definite circumstances was the very reason for concluding a given treaty or if there had been a change in circumstances which would be so radical that the parties could no longer discharge the obligations of the treaty. However, the Convention forbids the invocation of that *clausula* in the case of frontier treaties or in the case where the radical change in circumstances results from the violation of the treaty by one of the contracting parties.

Nahlik's book is a valuable commentary on the work of the Vienna Conference and on the Convention itself. Its drawback is its publication in Polish, the range of which hardly exceeds the frontiers of Poland. The Polish publishing house would be well advised to publish an English translation.

W. W. KULSKI

The Bilateral Treaties in Force between the U.S.A. and Italy. By Emanuele Turco. Rome: International Publishing Enterprises. Pp. 1270. Indexes. Lit. 62,000, \$95.00.

One of the most time-consuming tasks for anyone working in international law and international relations is to locate the texts of treaties in force, especially bilateral treaties. It is astonishing that, in spite of excellent

bibliographies and guides, indexes, and collections of texts of treaties, it frequently happens that the researcher hits a snag and, in order to verify or check a minor point in a treaty, has to spend an inordinate amount of time to looking for that treaty and may not find it at all.

Turco therefore has performed a great service by compiling *The Bilateral Treaties in Force between the U.S.A. and Italy*. As the compiler has pointed out, the United States Department of State publishes in *Treaties in Force* the list of treaties the United States considers to be in force. Unfortunately, no counterpart of the publication exists in Italy. Moreover, after a list of treaties considered to be in force by Italy was compiled, Turco found a disparity between the American and Italian lists, as several were considered to be in force by only one of the two countries. A further difficulty which Turco had to face was the problem of access to the texts of the treaties; several treaties had never been published. It is of great help, therefore, that the compiler successfully dealt with these difficulties and in the present work published the text of 110 treaties which either or both countries considered to be in force as of January 1, 1975.

The treaties are in chronological order beginning with the Extradition Convention, signed in Washington, March 23, 1868, and ending with the Agreement effected by exchange of notes relating to the application of the convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income of March 30, 1955, Rome, December 13, 1974. The treaties are printed in both Italian and English face to face. Wherever the original text has been amended, the amendments are included in italics in the text, and the original version is reproduced in the footnotes. Two indexes, one chronological and the other analytical, provide the user with references to all provisions which deal with a specific topic. The two volumes are beautifully produced and are an eminently useful tool for all working in the field.

CHARLES SZLADITS

Foreign Relations of the United States, 1948, Vol. I, General: The United Nations (in two parts), Part 2. (Dept. of State Pub. No. 8849). Washington: U.S. Govt. Printing Office, 1976. Pp. xii, 510. Index. \$8.50.

The first Part of this book¹ deals with United States policy with regard to the United Nations. Pagination of this volume continues that of Part I. In Part II other general topics are discussed.

U.S. national security policy is depicted in its high level, general aspects. As stated by Undersecretary of State Acheson, the most important function of the Department of State's Policy Planning Staff would be to project development of foreign policy into the future in the light of past actions. Other phases of national security policy are estimates of threats to U.S. security; organization for it; military posture in relation to foreign policy; military assistance to foreign nations and military bases and air transport rights abroad; foreign policy in relation to strategic stockpiling; and foreign information policy.

¹ Reviewed in 70 AJIL 888 (1976).

In the interest of national security, the Secretary of the Army wrote a memorandum to the National Security Council on May 19, 1948, urging early consideration of a U. S. position concerning employment of atomic weapons and organization for application of atomic warfare. This top secret communication, like other such documents, was declassified for release in this compilation. On December 6, 1948, the Secretary of the Navy inquired of the Department of State regarding the likelihood of a surprise attack against naval vessels concentrated in U.S. ports. In its reply, the Department said that an estimate of such development would seem to be for the National Security Council. It added, however, that the Berlin situation increased the risk of war; that, while generally improbable, nothing could be entirely excluded as a possibility; that such an attack would not likely occur unless the Soviet Government had decided to start a third world war; and that there was as yet no evidence of such Soviet intention.

The section on national security is followed by one on foreign policy aspects of atomic energy development by the United States. In connection with the conclusion of negotiations with the United Kingdom and Canada on atomic energy, the United States had the objectives of terminating the secret wartime agreements, of securing more uranium, and of removing misunderstandings among the three countries. There are minutes of meetings of the tri-partite Combined Policy Committee as well as minutes of its American branch. Correspondence with other governments is also included.

The next item is the delegation of authority by President Truman to the Secretary of State to designate U.S. delegations and representatives to international conferences and organizations. With a view to expanding world trade and employment, the United Nations took steps to create an international organization devoted to those purposes. Documentation covers the U.S. interest and participation in this effort as well as its participation in the meetings of the contracting parties to the General Agreement on Tariffs and Trade (GATT).

To further U.S. commercial policy, the bases of which are dealt with in this volume, President Truman signed the Trade Agreements Act of 1948 (62 Stat. 1053), although he felt that some of its provisions would hamper negotiation of new agreements. The United States also proceeded with the negotiation of new treaties of friendship, commerce, and navigation as well as conventions for the avoidance of double taxation. There follows documentation on U.S. policy regarding foreign credit and investment and the foreign assistance programs.

The last section in the book relates to U.S. policy regarding Antarctica. It contains a Draft Agreement prepared by the Department of States which provides for the internationalization of that region. The Draft is preceded by a brief outline of the Department's reasons for supporting an international status.

As with respect to other volumes of this series, scholars, government officials, and other readers owe a debt of gratitude for the care, thoroughness, and farsightedness in the preparation of this book by the Department of State and particularly the Historical Office, Bureau of Public Affairs.

JOHN MAKTO

Foreign Relations of the United States, 1950, Vol. II, The United Nations; The Western Hemisphere. (Dept. of State Pub. No. 8853). Washington: U.S. Govt. Printing Office, 1976. Pp. xii, 1049. Index. \$13.

The first topic discussed in this volume is general relations between the United States and the United Nations. Prompted in part by the unanimity rule in UN Security Council voting, influential groups of Americans became disillusioned with the United Nations. In 1949, this attitude was reflected in a number of congressional resolutions which would have undermined that organization. In very strong terms, the Department of State expressed the view to the Senate that the United Nations was at the center of U.S. foreign policy. In 1950, the Senate Foreign Relations Committee declined to support those resolutions.

In regard to the United Nations, a primary objective of fundamental U.S. foreign policy was to ensure the security, freedom, and well-being of the American people. It was recognized that these conditions depended, at least in part, on like ones for other peoples and on orderly relations among nations. The United Nations helps countries to achieve common interests, especially in world peace and security, and it is therefore in the interest of the United States to maintain that organization and to view it as a means to an end rather than an end in itself.

In addition to several specific items of a political, security, economic, and social nature, international law is discussed. The U.S. policy was to recognize its binding force and to advance its role as a means of achieving stability in international society.

The U.S.-UN Headquarters Agreement of 1947 gave rise to the question whether the Chinese Communist regime, if seated in the United Nations, would have a right to U.S. visas for its representatives. The Department of State decided that, although unrecognized by the United States, the regime would be entitled to visas. Another problem under the 1947 Agreement related to taxes. The U.S. Government continued to hold that American citizens employed by the United Nations could not be exempt from the payment of national income taxes. The section on general relations between the United States and the United Nations closes with general organizational matters affecting the United Nations. It is followed by documentation of U.S. policy with respect to problems of the representation of China in UN organs.

The Korean crisis focused attention on the fact that lack of unanimity of the permanent members of the UN Security Council could stalemate the United Nations in possible future cases of aggression. On July 27, 1950, the U.S. Representative at the United Nations proposed to the Department of State the establishment of a Security Council Commission which would be authorized by the Council to visit or station observers in any area threatened with aggression or military action. The Department instructed the U.S. Representative to proceed in the United Nations along the general lines of his suggestion and submitted a draft resolution for the establishment of a Security Council Fact Finding and Observation Commission. Consultations with other governments and at the United Nations

culminated in the adoption by the UN General Assembly, on November 3, 1950, of what came to be known as the "Uniting for Peace" Resolution.

On July 21, 1950, the UN Secretary-General placed on the UN General Assembly's provisional agenda his memorandum for consideration of a twenty-year UN peace program. The United States associated itself with the broad objectives of the proposal, which were to remove tensions and to move toward peace by employing UN Charter principles and UN resources. By a resolution of November 20, the General Assembly commended the Secretary-General for his initiative and requested the appropriate UN organs to give consideration to those parts of the memorandum with which they were particularly concerned.

The United States held conversations in Washington with the United Kingdom, France, and Belgium in regard to trusteeship and non-self-governing territories. In the colonial policy talks, the United States emphasized its desire to continue the program of the UN Special Committee on Information Transmitted Under Article 73(e) of the Charter. A resolution adopted by the UN General Assembly on December 13, 1950, provided that the international trusteeship system applied to South West Africa. Also, considering the advisory opinion of the International Court of Justice regarding that territory, rendered on July 11, 1950, the Assembly urged the Union of South Africa to transmit reports on that territory to the United Nations.

The part on the United Nations in this volume closes with UN action and the relevant U.S. position regarding the broad area of human rights and social action. These matters included the draft covenant on human rights, the draft convention on freedom of information, refugees and stateless persons, prisoners of war, and the treatment of Indians in the Union of South Africa.

The rest of this volume is devoted to U.S. relations with various countries. It begins with Canada and efforts to negotiate closer cooperation between the two countries. A one-sentence reference is made to five agreements and certain tax conventions.

Consideration of multilateral relations with the American Republics starts with U.S. policy toward them as a group, then moves on to the OAS Charter, peaceful settlement of disputes, hemisphere defense, military missions in certain American Republics, and the economic and technical assistance policy of the United States toward the American Republics as a group.

The documentation on U.S. bilateral relations with the seventeen American Republics involves political as well as economic matters. It ranges from communist activities to lend-lease arrangements and includes U.S. reaction to the definition of the territorial sea by El Salvador and U.S. recognition of the Military Junta in Haiti.

This volume continues the high standards we have come to expect in *Foreign Relations*.

JOHN MAKTOŠ *

* Deceased February 26, 1977.

BRIEFER NOTICES

The Dynamics of International Law. By Georg Schwarzenberger. (South Hackensack: Fred B. Rothman & Co.; London: Professional Books Limited, 1976. Pp. xii, 139. Index. \$15.) This book, short as it is, says a great deal on several major themes treated more extensively in the author's longer works. Because it is concise, it has a sharpness that suits its tough thesis of international law as a system of power politics, open or disguised. Professor Schwarzenberger, relying on Article 38 of the ICJ Statute, hits hard at the pretensions of international bodies, especially the United Nations, to create law. He is also sceptical of transnational law, international criminal law, *jus cogens*, some ICJ opinions, and human rights treaties with wide escape clauses. But he skims over the uncertainty of Article 38 criteria and he minimizes—and sometimes mocks—the recent collective demands for a more decent world and their formative impact on law-creation.

Schwarzenberger is not without idealism and his own brand of "soft law." Equity, the "*jus aequum*," broadly defined as good faith and reasonableness, is exalted as an element of international law. His evidence of equity goes back to Hittite-Egyptian relations in the 14th century B.C., treated here in fascinating detail. Although the "*jus aequum*" still seems elusive to this reader, the author's audacious use of historical models and his proposals for comparative history of international law open up new vistas for teaching and research. With his prodigious learning and intellectual vigor, Professor Schwarzenberger, better than anyone, can lead the way.

OSCAR SCHACHTER

The Concept of Jus Cogens in the Law of Treaties. By Christos L. Rozakis. (Amsterdam, New York, Oxford: North Holland Publishing Co., 1976. Pp. xiv, 206. Dfl.70, \$26.95.) In this book, based on the author's doctoral dissertation, the notion of *jus cogens* is studied in the framework of the Vienna Convention on the Law of Treaties. The first three chapters are devoted to substance: the function, identification, and modification of *jus cogens* norms; and the last two to procedure: the "sanctioning power" of the norms and the settlement of disputes.

Rozakis sees the introduction of public policy restrictions on the contractual autonomy of states as a step forward in the growing "institutionalization" of the international legal order. A needed "vertical" element is thus imported in the traditional horizontal structure of international law rules. He approves, with few reservations, of the "double consent" test for the identification of *jus cogens* norms provided in Article 53 of the Vienna Convention: They must be rules of general international law and accepted as *jus cogens* by "the international community of States as a whole." He finds the test flexible and durable, properly responsive to the consensual basis of international law yet strict enough and little susceptible to abuse, thereby safeguarding the security of international transactions. On the other hand, he criticizes as unrealistically strict the Convention's requirement that only norms of the same nature may modify existing *jus cogens* norms.

The author reserves his strongest criticism for the Convention's procedural provisions. Proper procedural machinery for implementing the substantive assertion of *ius cogens* must confront, according to him, two basic issues: the "interpretation and application" of the related legal provisions and "the realization of the sanction" of invalidity. He finds that Articles 65 and 66 of the Convention deal effectively with the former issue but fail with respect to the latter, by limiting the ability to invoke a treaty's illegality only to states party to it and by not adequately providing for compulsory settlement of all possible related disputes. He concludes that, here as elsewhere, "bold intentions of substantive changes have been neutralized by weak procedures" (p. 193).

This is a valuable study of an elusive and controversial topic. Dr. Rozakis' analysis is perceptive, thorough, and very clear. His critique of the Vienna Convention is made with full awareness of the constraints on states participating in the Conference and of the necessities of compromise, yet he does not fail to note points of recurrent confusion in the deliberations. Not all readers will share his positivist predilections for a "more centralized world order" or for treaty law as having "the advantage of providing clear and unambiguous rules" (p. 64). Indeed the last assertion comes as a surprise after the author's penetrating discussion of the obscurities, ambiguities, and other shortcomings of the Vienna Convention. Yet all readers are bound to find his careful and effective analysis instructive and stimulating.

A. A. FATOUROS

Studi in Onore di Manlio Udina. Pubblicazioni della Facoltà di Giurisprudenza della Università di Trieste. *Tomo I, Diritto Internazionale Storia delle Relazioni Internazionali; Tome II, Diritto Internazionale Privato Altre Scienze Giuridiche.* (Milan: Dott. A. Giuffrè Editore, 1975. Pp. xxviii, 1860.) Two splendid volumes of articles, written by scholars, most of them in Italian, some in French and German, and a few in English and Spanish, pay affectionate homage to Manlio Udina whose distinguished academic career in international law has spanned almost half a century from his first appointment at the University of Bari to his long and creative work at the University of Trieste, where he became Dean of the Faculty of Jurisprudence and Director of the renowned Institute for International Law and Comparative Legislation.

Volume I is devoted to studies of international law and the history of international relations while Volume II deals with Private International Law/Conflict of Laws and other jurisprudential matters. On the whole the articles of Volume I, which hold more interest for students of international law, are of remarkably good quality for a compendium of this sort. Issues touching the peculiar legal status of Trieste understandably are highlighted in three studies, but subjects like international norms for multinational corporations, international prevention of the hijacking of aircraft, liability for violation of the European Human Rights Convention, uniform law for aliens, the expatriation of nationals, and innocent passage through international straits have also been addressed. In addition a number of articles on such topics as the Organization of African Unity, the Commission of the European Community, the question of abstention in votes by the permanent members of the UN Security Council, and the historical framework for the evolution of international agencies provide valuable insights for the student of international organization.

Given the quality of the authors, including such distinguished scholars as Florio, Hambro, La Pradelle, Malintoppi, Monaco, and others too numerous to mention, these studies have appropriately honored Manlio Udina, whose own work of more than 125 books and articles will remain an inspiration to both scholars and practitioners of law for generations to come.

GERARD J. MANGONE

Soberanía del Estado y Derecho Internacional (2nd ed.). By Juan Antonio Carrillo Salcedo. (Madrid: Editorial Tecnos, 1976. Pp. 448, Index.) A static view of international law detaches it from the concrete factors which affect its life and progressive development. The particular aim of this book is to counter that kind of abstract formalism and discuss one of the basic contradictions of the contemporaneous international order, namely, the necessity of interstate cooperation, on the one hand, and the persistence of the notion of state sovereignty, on the other. In fact, this is a contradiction with which it is necessary to live, since, although a large part of international law is based on state sovereignty, another and not inconsiderable part is based on the limits imposed by the international community on the freedom of action of individual states. Thus, constraints are placed on states due to the inherent relativity of the rules of international law and the exigencies of international cooperation, especially when this is carried out through the permanent and institutionalized fora of international organizations. Given the worldwide character of the great problems of our time and the thrust towards the interdependence of states, it might appear that sovereignty is an anachronism. Nevertheless, in spite of the contradiction mentioned above, the fact is that state sovereignty continues to be a basic constitutional principle of international law and not an element destructive of international order. It is not a relic of the past; rather, it is a reality from which it is possible to take a dynamic and total vision of international law.

The book begins with an examination of state sovereignty and international order. The discussion of the position of the sovereign state in the international order places emphasis on the protection of human rights and the principle of the self-determination of peoples. In the consideration of the legal significance of state sovereignty, the focus is placed on the principles of the equal legal status of states and of nonintervention.

The part on the relative nature of international law deals with the relevance of the consent of the state in the establishment of international legal norms and the consent of the sovereign state as a basis of international jurisdiction. There are, of course, limits to the relativity of international law, and hence the next part of the book examines the principles of good faith, nonformality of consent of states, and effectiveness. This part also contains a detailed discussion of the norms of *jus cogens*. The part on state sovereignty and international organization takes up such varied items as the international civil service and state sovereignty; the exclusive jurisdiction of states and international law; the jurisdiction of international organizations and state sovereignty; the interpretation of the UN Charter; and the progressive development of international law through resolutions of the General Assembly.

This thought-provoking book throws much light on the difficult problem of reconciling the self-determination of states with the increased interdependence of states as exemplified through the growth of international organizations. The book merits a wide readership.

GERALD F. FITZGERALD

The International Legal Status of the Aircraft Commander. By Nicolas Mateesco Matte. (Toronto: The Carswell Co., Ltd.; Paris: A. Pedone, 1975. Pp. 119.) The status in international law of an airline pilot when flying over foreign states or the high seas is as complex as that of the master of a ship. Among the problems are: his authority for the safety of the aircraft; his authority over passengers in flight; his responsibility for violations of customs, immigration, and health regulations; his obligation to obey orders of foreign governments which, in his judgment, interfere with the safety of his passengers (a problem acutely highlighted by hijacking and terrorist activities); his right to counsel and to freedom from harassment if detained by authorities of a foreign government; his right to access to the consul of his government; and his conceivable personal liability for death or injury to passengers in the event of an aircraft accident.

Some of these matters are touched on in existing treaties, notably in Annexes to the Chicago Convention on International Civil Aviation of 1944 and in such treaties as the Warsaw Convention dealing with liability and the Tokyo and Hague Conventions dealing with hijacking and other crimes aboard aircraft. Yet no convention focuses primarily on the legal status of the aircraft commander, and such organizations as the International Federation of Airline Pilots Associations (IFALPA) continually press for such a convention which would pull together provisions scattered through other conventions, as well as fill many gaps.

A draft of such a convention was prepared in 1947 by the predecessor of the Legal Committee of ICAO, called the Comité International Technique d'Experts Juridiques Aériens (CITEJA). Proposals for a modernized version are regularly placed before the ICAO Legal Committee, and the recent history of crimes aboard aircraft, as well as the great expansion of international airline service, gives the matter renewed vitality. Matte's book contains the full text of the 1947 draft and a discussion of its history, with a topical breakdown by problems. The author notes that the subject is a complex of public and private international law. He advocates the urgent drafting of a revised version of the 1947 draft by ICAO.

The book is written in both French and English, alternately paged throughout and contains a brief bibliography of English, French, Spanish, and Italian sources. The author is the Director of the Institute of Air and Space Law at McGill University, and obviously well qualified for his task. While one misses a fuller treatment of the reasons for the opposition or indifference to such a convention during the many years of the pendency of the 1947 draft, the book provides valuable background material to anyone with an interest in international air law.

WILLIAM E. O'CONNOR

Seabed Politics. By Barry Buzan (New York, Washington, London: Praeger, 1976. Pp. xviii, 311. Index. \$20.) This is an analytic history of the law and politics of the continental shelf and the seafloor beyond national jurisdiction. The title is perhaps unfortunate, since to many readers it may connote a different, more narrowly focused study than that Buzan has undertaken. With a proliferating literature addressing all aspects of the law of the sea, this work provides new information and an important historical perspective seldom available. Buzan addresses the seabed in chronological fashion beginning with antiquity but concentrating on events since World War II. The analyses of the development of the process of claim and counterclaim are illuminating, placing the current complex law of the sea situation in perspective.

Also excellent, although more duplicative of other work, is the analysis of the present status of the seabed as the Third United Nations Law of the Sea Conference enters its fourth year. In the concluding portion of the book (where the author admits that the chronological approach must be abandoned), several models are suggested for explaining and interpreting many facets of seabed politics. A general model posits interrelationships among the rise in the value of the seabed, international action, and national action. More detailed models are suggested to explain the negotiations on the continental shelf and the deep seabed. Although one might argue with the details of these models, they perform a valuable service adding depth and theoretical understanding to the work of the current UN Law of the Sea Conference.

I strongly recommend Buzan's work. It represents a fresh, thorough approach to a contemporary and vitally important subject. It should be of extraordinary interest to students of international law and international relations and to anyone who has followed the efforts of 145 states trying to achieve reasonable patterns of seabed use and control.

JOHN KING GAMBLE, JR.

The United Nations. The abhorrent misapplication of the Charter in respect of South Africa. By George J. de Lint. (Zwolle, Holland: W. E. J. Tjeenk Willink, B.V., 1976. Pp. viii, 121. Fl. 17.50.) This book by a Dutch jurist offers a spirited defense of South Africa's racial policy. It presents, without excessive stridency, a point of view and a version of the facts that deserve more fair-minded consideration than they are likely to receive in the United Nations.

The author raises, but is not preoccupied with, questions about the legal competence of the United Nations to concern itself with South African racial policy. His major concern is substantive, not jurisdictional; he undertakes to show South Africa is attempting, in good faith, to solve its complex racial problems in a way that is fair, reasonable, and wholly consistent with the principle of national self-determination. That way is described as "the policy of multi-national development," based upon the view that each of the several peoples of South Africa (and of Namibia) is entitled to self-determination within a homeland that has been at least roughly defined by history. The Europeans, having long since made good their claim to self-determination against the British, are now promoting black self-determination; Transkei is but the first fruit of that policy. Critics call this a policy of creating "bantustans" subservient to South Africa, and see it as a scheme to perpetuate *apartheid*. De Lint argues that it is the essential preliminary to the ending of *apartheid* and regards the critics' insistence upon majority rule in a unitary South African state as a plan for depriving the Europeans of their right to self-determination. South Africa, in his view, interprets the principle of self-determination more correctly and adheres to it more genuinely than do its antagonists.

The author raises legitimate questions about the meaning and application of self-determination in the context of Southern Africa. How many selves, and which selves, ought to be accorded the right to determine their political destinies? Who is entitled to speak for the various selves? If there were not such deep hostility and mutual mistrust between South Africa and its critics, one might hope for an honest debate on these issues that might lead to solution of the problems that make the region so explosive.

INIS L. CLAUDE, JR.

Thesaurus Acroasium Vol. II The Law of the United Nations. Prefaces by J. Zourek and D. Constantopoulos. (Thessaloniki, Greece, 1976. Pp. 429.) This volume contains the lectures and *travaux préparatoires* delivered or prepared for the 1973 session of the Institute of Public International Law and International Relations of Thessaloniki. While the initiative and enterprise of the Thessaloniki Institute is to be applauded, this volume illustrates the difficulties to be encountered in undertaking such a project.

A potentially interesting range of subjects is dealt with in a somewhat uneven fashion, ranging from the superficial to the stimulating, while the editing leaves a great deal to be desired. Nevertheless, there is some substance to the volume. Two of the lectures, in particular, merit attention: The United Nations and Southern Africa by C. J. A. Barratt and Le système de sécurité internationale by Professor Jaroslav Zourek. Mr. Barratt's lectures trace comprehensively the United Nations involvement with Southern Africa. Mr. Barratt, who is not identified (an annoying editorial quirk), appears to write from a South African perspective and reaches some sober conclusions. It is a pity, therefore, that his lectures were completed before the events of the twenty-ninth session of the UN General Assembly.

Professor Zourek's lectures are imbued with an idealism that commands respect. He categorically rejects recent studies (Andrey, Lorenz, and Morris) which depict man as a naturally aggressive animal. Society's numerous attempts to prohibit the use of force in international relations from antiquity to the present time evidence man's deep-rooted desire for peace. While acknowledging that the collective security system as envisaged in the UN Charter has been rendered impotent, Professor Zourek concludes that the evolution of international relations under contemporary economic and social pressures will eventually restore to the United Nations the primary functions of peace and security.

Of the remaining lectures in this volume, Nils Lund gives a sober and competent account of the problems faced by the United Nations in the field of public information; F. Munch discusses the law of the sea; L. G. Marcantonatos analyzes the Vienna Convention on Consular Relations; M. Udina describes the structure of the UN system; and D. J. Reeb attempts to unravel, not always successfully, the mysteries of financing the United Nations.

RALPH ZACKLIN

Russian and Soviet Law: An Annotated Catalogue of Reference Works, Legislation, Court Reports, Serials, and Monographs on Russian and Soviet Law (Including International Law). By William E. Butler. (Zug, Switzerland: Inter Documentation Company AG., 1976. Pp. xvi, 122. Sfr. 38.50, paperback catalogue without the Note on Bibliography, gratis.) Professor W. E. Butler has been using his unparalleled knowledge of bibliography for several years to assemble and print on microfiche a library now exceeding 250 titles. The present hard cover book is its catalogue, supplemented by a bibliographical note informing readers of all bibliographies in Russian or other Western languages to which this catalogue is a supplement. Since the volume is not only a bibliography but a catalogue, readers will avoid the familiar frustration of finding listings which are out of print or missing from libraries to which they have access, for all listed works can be purchased on microfiche.

Butler's annotations are remarkable for their coverage. Serials are listed with full information on what they covered, when they appeared, when they had gaps, changed their titles, or terminated. Official Gazettes, not only of the Empire and the USSR but of the latter's Republics as well, are given with information on how many issues appeared each year, when they had gaps, or were kept secret from foreigners, when their titles changed. Treatises have not only the usual information but notations as to where they were reviewed, or where translations were published. Photographs of title pages and of prominent authors enhance the pages. An Index of authors facilitates search. Scholars in need of bibliographical aid could not wish for a more useful tool.

JOHN N. HAZARD

Curso de Derecho Internacional Público. Séptima edición. By César Sepúlveda. (México: Editorial Porrúa, S. A., 1976. Pp. xxii, 591. Index.) Professor Sepúlveda, Senior Professor of the Faculty of Law at the National University of Mexico, obviously has been alert to keep his textbook abreast of developments in international law. The current (seventh) edition contains a detailed analytical table of contents, 454 pages of text, a documentary appendix of 126 pages, and an index. Each chapter of the text is preceded by a select, cosmopolitan, and up-to-date bibliography. Since the text is limited in length, no topic is given more than brief attention; however, the coverage is comprehensive, with emphasis predictably upon Hispanic contributions and usages. As could be expected of a scholar with Continental orientation, reliance is much heavier on lawmaking treaties and conventions, national statutes, and authoritative treatises than on judicial precedents. Consequently, the book is more like Brierly's *The Law of Nations*, than the works of Briggs or even Von Glahn. The writing is true to Sepúlveda's lucid and graceful style. A translation of this work into English would provide a worthy addition to our sparse collection of undergraduate international law textbooks.

WILLIAM G. CORNELIUS

Le Parti nel Processo Internazionale. By Angela del Vecchio. (Milan: Dott. A. Giuffré, Editore, 1975. Pp. viii, 319. Index. L 6200.) This book gives to the reader much more information than its title "The Parties in International Legal Proceedings" indicates. The author describes in a lengthy introduction the history and organization of the major international judiciary institutions, which include the International Court of Justice, some Mixed Arbitration Tribunals no longer in existence, the Permanent Court of Arbitration, the Central American Courts of Justice, the Court of Justice of the European Communities, and the European Court of Human Rights. The first chapter of the book is a systematic outline of the basic principles of the legal proceedings before those courts. The author describes the technical aspects of complaints, petitions, memorials and other actions, the parties authorized to appear before the courts, the jurisdictional questions arising before the tribunals, and the rights and limitations of agents, attorneys, consultants, and experts. Additionally the author describes the practice of third-party intervention and the effect of judgments and decrees by default. There are chapters on counterclaims, the law of evidence, and the fulfillment and execution of international judicial orders, decrees, and final judgments.

Among the more remarkable observations of the author are her views on the capacity of parties before international tribunals, where for a long time only states represented by their governments had a legal standing. Private

persons, including corporate entities, were not admitted, but the governments of the states could espouse claims of their citizens and frequently did so. However, the Treaties of the European Economic Community and of the European Atomic Energy Community, signed in Rome in 1957, provide that any physical or juridical persons may, under certain conditions, apply to the Court of Justice of the European Community for relief from decisions of the European Common Market authorities, if their interest is directly and individually involved. The author is of the opinion that this provision has to be construed strictly within limitations; the intervention of private persons must be based upon an interest of civil or administrative character, while political questions and disputes of an international diplomatic nature are still reserved exclusively to the states involved, even though a private individual or corporate entity may be marginally implicated. It appears that this view is based upon recent opinions and practice of the European Court.

Ms. del Vecchio writes in a surprisingly clear, simple, and smooth style. Her observations are nevertheless based upon a very thorough and careful research, fortified by a scholarly attitude which suggests that we may expect more valuable studies on international legal matters from this author.

ZVONKO R. RODE

Umweltschutz im völkerrechtlichen Nachbarrecht. By Eberhard Klein. (Berlin: Duncker & Humblot, 1976. Pp. 354. Index. Bibliography. DM 79.) Dr. Klein's meticulously fact-filled book presents an overview of the developing international law relative to transnational pollution. He defines pollution ("Verunreinigung") for purposes of this study as any man-made qualitative change in the natural order of the biosphere that is apt ("geeignet ist") to create damage in a neighboring state; he defines "neighbor" to include nonadjacent as well as adjacent states in the area likely to be affected by polluting emissions.

The book is organized on the European pattern. The factual background is followed by a section setting out general legal principles, such as abuse of rights, neighborliness, and good faith. Those legal principles are then seen applied in state practice, bilateral and regional agreements, arbitrations, the 1972 Stockholm Declaration, and documents emerging from the OECD and the Council of Europe. The phenomena to which these sources of law are applied are water pollution, air pollution, and noise pollution. Techniques through which the norms of international law are applied are examined, especially the activities of various international organs of cooperation such as the European organs, the International Joint Commission (United States-Canada) and many others. The conclusion is that the problems are greater than the established law and organs of cooperation are able to handle without strain.

The book is essentially Europe-centered, even to the extent of ignoring precedents cited in Whiteman's *Digest* (which does not appear in the long bibliography) or some of the leading writings published on this side of the Atlantic Ocean, such as Judge Read's inside story of the Trail Smelter Arbitration.¹ Thus there is no mention of the American assumption of responsibility to curb noxious smells at the El Paso-Ciudad Juarez border.²

¹ 1 CAN. Y.B. INT'L L. 213 (1963).

² 6 WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 256-57 (1968). For the significance of the case, see Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 ORE. L. REV. 259 at 276 sqq. (1971).

as potentially a major reinterpretation of the "injury" rule, although the importance of the case to an understanding of the legal concept of damage is apparent. Similarly, he does not cite the one discussion of the key concept of neighborliness in a pollution context that is likely to be familiar to American readers.³ In effect, the book shows a European sophistication and breadth comparable to the best work done in the Western Hemisphere, but also has traces of a blindness to the labors of the author's non-European colleagues equivalent to our own frequent lapses into parochialism.

ALFRED P. RUBIN

La Genèse de l'Unesco: La Conférence des Ministres Alliés de l'Éducation (1942-1945). By Denis Mylonas. (Brussels: Etablissements Emile Bruylant, 1976. Pp. 495. Index. B. Fr. 3.074.) The author begins this useful study by calling our attention to an important gap in the literature of international relations. In spite of the ever-growing rich literature in the field, there is little treatment of the origins of international organizations. The story of those origins is often left buried in the papers of foreign ministries and in stacks of unedited documents.

This volume traces the creation of a specialized agency of the United Nations, the United Nations Educational, Scientific and Cultural Organization (UNESCO), beginning with an analysis of the cultural and educational organizations established during the interwar period. The bulk of the study, however, focuses on the process which laid the groundwork for UNESCO, namely the Conference of the Allied Ministers of Education which met periodically in London during the years 1942-1945. In reviewing that process, the author singles out three factors for special emphasis: the official policies of the states involved (particularly the major powers), the historical conditions of the period, and the particular individuals involved as protagonists in the negotiations.

Although the book represents a rather specialized historical study, the author is nevertheless sensitive to the professional interests of political scientists and students of international law in his treatment of the politics and legal issues involved in the events leading up to the establishment of UNESCO. By way of analytical conclusion, the author considers briefly the question of whether generalizations can be drawn from the UNESCO experience concerning the creation of other international organizations. He identifies several crucial stages during the process and emphasizes the importance of certain creative forces. The analytical sketch is modest but worth consideration by other scholars engaged in tracing the genesis of selected international organizations.

FOREST L. GRIEVES

La Organización de las Naciones Unidas. Su estructura y funciones (2nd revised ed.) By Manuel Medina. (Madrid: Editorial Tecnos, 1974. Pp. 222. Index.) This book, although a revised edition of the 1969 version, has undergone little change in comparison to the original, the main difference being, according to the author, coverage of the attitude of the Spanish-speaking readers towards the United Nations.

The first part of the work deals in a properly brief fashion with the establishment, purposes, and principles of the Organization, preceded by

³ Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AJIL 50 at 53-58 (1975).

a short reference to the real and ideal precedents of the United Nations. The second part, following the structure outlined in the Charter, explains the organizational frame of the United Nations; this explanation is sustained by reasonably extensive but succinct references to the Organization's activities over an extended period of time. The third and final part is dedicated to the various functions to be fulfilled, and to a certain extent actually fulfilled, by the United Nations. After establishing a set of levels of analysis, the author deals with that subject within what could be called an international politics framework.

The book, completed by some necessary appendixes and illustrated by several useful graphs, appeals in a broader sense also to those who do not have a specific, professional or other, interest in the subject. In view of the scarcity of literature in Spanish dealing with the United Nations, this book will be particularly useful to students in Spanish-speaking countries. In spite of the virtues of the book, one might have wished for a more precise critical appraisal of the United Nations, as well as some information about the changed attitude of the readers towards the Organization, which the author refers to, but which is not self-evident, given the present circumstances surrounding the world organization.

HANS-JOACHIM LEU

Annual Review of United Nations Affairs, 1974. Compiled and edited by Joseph T. Vamberly. (Dobbs Ferry: Oceana Publications, 1976. Pp. xxv, 484. \$17.50.) The *Annual Review of United Nations Affairs* attempts to "comprise in a single volume as much information on one year's activities of the United Nations as possible." This makes it a useful reference book for scholars, librarians, and students; however, the volume is not easy to read and Part I suffers from certain organizational weaknesses.

Part I summarizes briefly the work of the major organs of the United Nations, relying extensively on the summaries provided in the *UN Monthly Chronicle*. The selection of materials is rational and helpful, but the arrangement of them is not always logical. The table of contents, though detailed, does not appear to follow a discernible logical sequence. Under "Political and Security Questions," for example, the first item is the complaint by Iraq against Iran. No indication is given as to why this item should take precedence over all others. The next item is called "General Assembly" (29th Session). Included in this rubric are certain questions not essentially political or security in nature, while other important questions of such a nature are found elsewhere in the table of contents. The item "Strengthening of International Security" is included under the rubric "Middle East." Why? Similarly the section entitled "Namibia" also includes items on Southern Rhodesia and South Africa. Such weaknesses in the organization in the table of contents make it more difficult for the researcher to find what he wants, particularly given the absence of an index. The same weaknesses appear in the organization of the text itself.

The way items are treated is also inconsistent. In some cases, such as the Cyprus and Middle East items, the full texts of various resolutions are given; in many other cases where the contents of the resolution may be of equal or greater importance, the resolutions are merely summarized. A similar inconsistency of treatment appears in the item on "Strengthening the Role of the United Nations . . ." (p. 67). While two resolutions were adopted, the reader is informed that resolution 3282 was adopted by consensus and a complete list of 52 supporters is given. With respect to resolution 3283, no indication of the vote is given, nor are the supporters

identified. Similarly, under the item "General Assembly" (pp. 41-67) general debate statements by twelve heads of state or government are summarized, but other statements made in the general debate are not. The apparent assumption is that such statements are necessarily more significant than those made by foreign ministers and other representatives in the general debate, an assumption that could hardly stand up against an examination of the content of various statements.

Part II of the book provides 125 pages of very useful documents. These include outlines of the Report of the Secretary-General on the Work of the Organization for 1973-74 and 1974-75; a detailed listing of all resolutions and decisions adopted by the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council; and a listing of significant documents issued by or for these four major organs. This reviewer hopes that the *Annual Report* will be continued as a useful reference document but that its organization will be improved in future issues.

SEYMOUR MAXWELL FINGER

Asian-African Legal Consultative Committee. *Report of the Fourteenth Session, Held in New Delhi, January 10th to 18th, 1973*. (New Delhi: Secretariat of the Asian-African Consultative Committee, 1973. Pp. iv, 278.) *Report of the Fifteenth Session, Held in Tokyo, January 7th to 14th, 1974*. (Id., 1974. Pp. 122.) The annual reports of the Asian-African Legal Consultative Committee, now in their fifteenth year, have become successively slimmer (Tenth: 412; Eleventh: 377; Fourteenth: 278; Fifteenth: 122 pages) reflecting an increasing apathy in exploring legal problems common to the Asian-African communities. Instead, the tendency has been to leave the initiative in such studies to the United Nations, the International Law Commission, the International Law Association, and other organizations. Thus the reports of the Thirteenth,¹ Fourteenth, and Fifteenth sessions all deal with the law of the sea and with trade law as developed, respectively, by the UN Conference on the Law of the Sea and by UNCITRAL, reiterating positions already defended by the Asian-African states at those conferences. The Thirteenth and Fourteenth reports deal similarly with the Helsinki Rules on international rivers. The report of the Fourteenth session reexamines the work of the International Law Commission on the Protection and Inviolability of Diplomatic Agents and Other Persons. It also provides a discussion of the relative merits and disadvantages of various systems for organizing governmental advisory services in international law, as part (i) of the Ministry of Justice, (ii) of the Foreign Service, (iii) as a specialist division of the Ministry of Foreign Affairs, and (iv) as a mixed system. However, considerable reliance is placed this time on the conference on legal advisers and foreign affairs sponsored by the American Society of International Law in 1963, which produced the report *Legal Advisers and Foreign Affairs*.² Several passages of that work (pp. 57, 84-85, and 100) have been adopted (pp. 212-13, 217, and 220) without attribution by the Committee. A redeeming feature of the Fourteenth Report is, however, the lucid and incisive commentary on the draft UNCITRAL convention on Prescription in the International Sale of Goods.³

JOHN H. SPENCER

Public International Air Transportation Law in a New Era (Economic Regulation of International Air Carrier Operations). By H. A. Wassen-

¹ See 69 AJIL 472 (1974).

² H. C. L. Merillat (ed.) (1964).

³ UN Doc. A/8717 (1972), 11 ILM 1000 (1972).

bergh. (South Hackensack: Fred B. Rothman & Co., 1976. Pp. ix, 165. Index. \$25.75.) Dr. Wassenbergh's latest book on international air transportation law covers international civil aviation developments in the last decade. As in his previous works,¹ the author displays an exceptional combination of theoretical and practical knowledge of the subject matter. A staunch and convincing advocate of a multilateral approach to international civil aviation problems, he shows how, since 1945, this approach has changed from multilateral to bilateral, and more recently to a unilateral one. Wassenbergh condemns the current practice of a number of states of interpreting the "equal opportunity to compete" clause of the Bermuda Agreement of 1946 (the model for most postwar bilateral air transport agreements between states) as a "right to equal benefits" clause. This interpretation necessarily leads to the view that the airlines of each nation would be entitled to carry their "own traffic," which, if at all feasible would, in the author's opinion, be a step backwards in the development of international civil aviation.

Much attention is given in the book to the recent proliferation of international charter air services and to the reaction thereto of the scheduled international airlines. The author proposes that governments work out a multilateral Code of Fair Competitive Practices. Thereafter, this will facilitate new bilateral air transport agreements covering scheduled international and charter air services. As we draw nearer to the phase when man realizes the obligations of sharing the benefits of his achievements, a "new freedom of the air" based on voluntary interairline cooperation could be developed.

This book examines in a very realistic manner the problems and possible solutions for economically sound international air transportation. It represents an instructive lecture and an excellent guide for other international lawyers, researchers, and policymakers.

NICOLAS MATEESCO MATTE

International Law and Outer Space Activities. By Ogunsola O. Ogunbanwo. (The Hague: Martinus Nijhoff, 1975. Pp. xxi, 272. Index. Gld. \$7.50.) This book is divided into three parts. In Part I, the author discusses the historical developments of the Outer Space Treaty of 1967. He dissects the Treaty into sections and definitions, using UN documents of the Legal Sub-Committee on Outer Space Activities. In the first chapter of Part II, the Agreement on Assistance and Return is loosely linked to the Treaty. Thereafter, the Agreement is considered with reference to matters of legislative intent. Part III, on basic liability for damages and responsibility, is mainly concerned with the development of the Treaty. Working papers and later drafts of the Treaty are meticulously synthesized with a precision and understanding not evident in other sections of the book. However, the author fails to strengthen his analysis by applying general principles of international law.

In Chapter XIII, the author discusses briefly some of the basic problems of international cooperation in the peaceful uses of outer space. He does not, however, discuss such essential questions as the future exploitation of the Moon and other celestial bodies. He also ignores many

¹ POST-WAR INTERNATIONAL CIVIL AVIATION POLICY AND THE LAW OF THE AIR (1962), reviewed in 58 AJIL 227 (1964); ASPECTS OF AIR LAW AND CIVIL AIR POLICY IN THE SEVENTIES (1970).

aspects of outer space activities that are unanswered by the UN Legal Sub-Committee, such as the three possibilities envisaged by the drafters of the Moon Treaty. Should the Treaty embrace the Moon and not other celestial bodies? Should the Treaty cover both the Moon and all other celestial bodies? Should the Treaty be applied to the Moon and other celestial bodies within our solar system? And nowhere in the book does the author discuss the basic dichotomy of interests regarding outer space, namely the view favoring return on investment expenditure by exploring nations as against the view of nonexploring nations that the principle of the common heritage of mankind, which gives men of all nations an inalienable right to profit from space exploration, should be applied to outer space.

The author relies heavily on UN documents and similar sources. He does not discuss proposals for a universal definition of space or for dealing with other basic problems. He offers no concrete proposals for future agreements, nor does he attempt to indicate specific areas requiring agreement. This text is for the uninitiated, and as such it can be recommended to students interested in space law.

CHARLES C. OKOLIE

Nemzetközi Jog. By György Haraszti, Géza Herczegh, and Károly Nagy. (Budapest: Tankönyvkiado, 1976. Pp. 491. Index.) The volume under review is an international law textbook, mainly for the use of students of law in Hungarian universities. Its publication was ordered by the Hungarian Minister of Education and its text was approved by censors, specialists in international law.

The organization of the book follows the traditional pattern: history of international law, its basic principles, states as subjects of the international legal system, the role of individuals, international treaties, representation of states, international organizations, settlement of international disputes, war and neutrality. Students using this textbook and assimilating its contents will no doubt acquire valuable information about the facts, principles, and practices relating to the relations of nations and the working of international institutions.

On the whole, the book is written in a nonpartisan spirit, although some of its interpretations are highly slanted. For instance, we read that the epoch-making event in the development of international law in the World War I era is the October Revolution; a special subchapter is reserved for the discussion of "imperialist military organizations," such as NATO, whereas the Warsaw Pact organization is listed among the peaceful organizations of the socialist states, alongside COMECON. However, almost all the topics included in this work are handled in a carefully worded legal manner, uninfluenced by political or ideological bias. The analysis, for instance, of the UN Charter seems particularly lucid and successful. The authors are to be complimented for having created, in the ambience in which they worked, a textbook which will allow students of law and others interested in international law and relations to obtain, despite some unbalancing aspects, a fair picture of the international legal system as it exists.

FERENC A. VÁLI

Colonial Emancipation in the Pacific and the Caribbean. A Legal and Political Analysis. By Arnold H. Leibowitz. (New York, Washington, and London: Praeger Publishers, 1976. Pp. xi, 221. Index. \$18.50.) Associated statehood or free association as a form of political organization

is an emerging phenomenon in contemporary international law and relations. The UN General Assembly has upheld the validity of this constitutional arrangement as a legitimate expression of self-determination.¹ The Commonwealth of Puerto Rico was created in 1952 under what may be termed the American model of free association. A similar scheme nurtured within the British tradition was inaugurated in 1965 between New Zealand and the Cook Islands and adopted two years later by six Caribbean island units which became "states in association with the United Kingdom." More recently, as an offshoot of negotiations to terminate the Trust Territory of the Pacific Islands, the United States granted the Northern Marianas an associate status analogous to that of Puerto Rico. The rest of Micronesia has opted for a more loose association with the United States along the lines of the British model and negotiations in this direction are under way.

The book under review deals with these and other comparable schemes of local-metropolitan relationships. The author examines the constitutional development of six island-states in the Pacific and six in the Caribbean. Four of these (Puerto Rico, Guam, TTPI, and the Northern Marianas) are linked to the U.S. federal system, as was the Philippines prior to independence. One of the six West Indies Associated States, Grenada, became independent in 1974, while the others (Antigua, Dominica, St. Vincent, St. Kitts-Nevis, and St. Lucia) remain in association with Britain. The Cook Islands-New Zealand arrangement is still in effect but that of Australia and Papua-New Guinea ended in 1975 when the latter attained full independence. Each of these twelve political entities is individually analyzed in terms of its internal characteristics and processes and its juridico-political, economic, and other linkages with the metropolis. On the basis of selected factors and policy areas Leibowitz discusses and compares salient aspects of the respective metropolitan-local relationships. The study tends to support previous findings by other authors which suggest that the British model of association is constitutionally more advanced with respect to internal autonomy, while the American formula is economically more advantageous to the lesser partner.

The book is not exhaustive and does not include all the existing associative arrangements in the Pacific and the Caribbean. It is, nonetheless, a valuable contribution to the systematic study of the theory and practice of free association or associated statehood as an alternative to separate independence or full metropolitan integration.

ANGEL CALDERÓN-CRUZ

Racial Discrimination and Repression in Southern Rhodesia. A Legal Study by the International Commission of Jurists. (London: Catholic Institute for International Relations; Geneva: International Commission of Jurists, 1976. Pp. vi, 118, £1.) The UN Security Council's first explicit use of its lawmaking powers under Article 41 of Chapter VII of the Charter¹ presupposed a "threat to the peace" because of the situation examined in this volume. Repression is shown to be all pervasive, and it is useful to see how much besides unequal voting rights needs to be reformed. While not a book about international law, the ICJ's monograph provides factual material of apparent authenticity (which can never be entirely assumed without adversary procedures) to be measured by international human rights standards.

¹ Cf., e.g., GA Res. 748, 8 GAOR, Supp. (No. 17) 25, UN Doc. A/2630 (1953); GA Res. 1541, 15 GAOR, Supp. (No. 16) 29, UN Doc. A/4684 (1960); GA Res. 2625, 25 GAOR, Supp. (No. 28) 121, UN Doc. A/8028 (1970).

² See SC Res. 221, April 9, 1966 and SC Res. 232, Dec. 16, 1966.

The Commission could have made a greater contribution to Rhodesian reform by doing this itself, *i.e.*, by discussing instances of discrimination and repression in the light of the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights. With its expertise and reputation for impartiality, the ICJ would have been an ideal agency for the task. Further comparative references would also have been useful. The brief allusions to Northern Ireland (pp. 50 and 85) and to Uruguay (p. 54) serve only to suggest how much perspective might have been gained by this means. There are nuggets in the slag heap of oppression. A reason for the success of late 1976 diplomatic initiatives may well be revealed by a reference (p. 70) to reports of 1975 warnings from security force leaders "... that white Rhodesia could not withstand a prolonged guerrilla war involving the 8,000 or more black Rhodesians then training in camps abroad."

Of concern to those anxious about the legal profession's performance under stress is the comment (p. 86) that "... the Rhodesia Bar Council which had unctuously stated on 24 August 1974, that the citizens who had suffered an assault always had a remedy in the courts, has remained silent during and since the passage of the Indemnity and Compensation Bill." Said to be unprecedented except in South Africa, the Bill is described as barring retroactively civil and criminal proceedings against government officials for damages resulting from "good faith" acts to suppress terrorism. The International Commission of Jurists might well make more of this professional dereliction by seeking to rouse non-Rhodesian lawyers from their inertia.

JOHN CAREY

Report on Torture. By Amnesty International. (New York: Farrar, Straus, and Giroux, 1975. Pp. 285. Bibliography. \$3.45.) This volume is an essential little guidebook to the horrors perpetrated around the globe, a Baedeker to the shadowy side of government. The introduction and first chapter are useful and well-developed overviews of the medical and psychological aspects of torture of the kind that we might find in the *Encyclopedia of Social Sciences*. Chapter 2 on legal remedies is an outline of three "Case Studies." It is insufficiently critical and analytic. It would have been useful also to include case studies of situations for which no "legal remedies" were found. The bulk of the book is devoted to a country-by-country "World Survey of Torture," a handy reference work to inhumane practices, not in fact always limited to torture. The overall impact is, however, unbalanced. Despite the difficulty of securing reliable evidence, not enough relative emphasis is given to the regimes which come first in the olympics of inhumanity, and too much space is devoted to the open societies that are easiest to study. The easy inference is that nearly all states are more or less implicated in the debasing practice of torture. This spreads responsibility too evenly.

The editors attempt to maintain a neutral balance between open societies like Great Britain and countries like the Soviet Union. They thus devote nine pages to the United Kingdom and four pages to the USSR. The volume also includes a one-page discussion of the Attica affair but makes only the briefest reference to the Gulag system. Some of the country sketches mention atrocities and acts of violence other than torture, but often the worst offenders get off lightly indeed. No reference is made to Cambodia or to Sudan nor to events in the south of that country. Nor is any reference made to the fate of the Kurds in Iraq. It is to be hoped that a future edition will modify the emphasis and that it will also include a

study of the abuses committed by "liberation movements" and "freedom fighters" who often continue their clandestine practices after seizing power.

Yet with all its defects and distasteful political biases, this volume has already become a classic in the field and is an essential addition to a library on the international protection of human rights. It is a major contribution to international efforts to eradicate torture.

GIDON GOTTLIEB

Internationales Recht der Rüstungsbeschränkung (International Law of Arms Control). By Gundolf Fahl. (Berlin: Berlin Verlag, 1975. Pp. 680. DM 175.) This looseleaf¹ volume is a useful tool for those interested in arms control and able to read German, and probably an almost essential one for those restricted to that language. The initial collection covers the following treaties or sets of agreements: Antarctic Treaty (1959); Partial Test Ban Treaty (1963); Outer Space Treaty (1967); Treaty Prohibiting Nuclear Weapons in Latin America (Tlatolco, 1967); Non-Proliferation Treaty (1968); Sea-Bed Treaty (1971); Biological Weapons Convention (1972) (also covering the 1925 Geneva Protocol); ABM Treaty (SALT I, 1972); "Hot Line" Agreements (US/USSR, 1963 and 1971; France/USSR, 1966); Agreements on the Prevention of War (US/USSR, 1971, 1972 and 1973); Partial Underground Test Ban Treaty (US/USSR, 1974).

For each of these instruments the following is set out: (1) an introductory Commentary (with a rather long bibliographical footnote) giving a historical derivation, reciting subsequent developments, and succinctly but relatively fully analyzing all important provisions with at least an indication of any controversial provisions or interpretations; (2) the treaty text in English (in one instance French) and German; (3) a collection of related documents, partly in the nature of *travaux préparatoires* (e.g., important preliminary drafts, proposals, and statements), other treaty instruments, relevant UN resolutions, up-to-date list of participants, maps indicating territorial coverage, and other useful tabulations (e.g., number of nuclear weapons tests, classified by country, date, and medium). However, in the initial collection the Commentary was included for only the first two treaties, though the table of contents indicates that it is to be supplied for all. As these analyses promise to be one of the most valuable features of this collection, it is hoped that those still outstanding will be promptly supplied. It is even more fervently hoped that the pace of disarmament negotiations will finally quicken so that the extra space in the spacious binder will soon be filled to overflowing.

PAUL C. SZASZ

Legal Choices for State Enterprises in the Third World. By Robert C. Pozen. (New York: New York University Press, 1976. Pp. xxiv, 263. Index. \$15.) This book is valuable to at least three groups of readers. For those lawyers interested in both the theoretical and practical aspects of wholesale transfer of a country's legal system to a developing country, the book contains a wealth of material. It points out the real limitations to such transfers, both in theory and in practical application. For those lawyers who are working with, or for, public corporations in developing countries, as well as nonlawyers in management positions, the book's in-depth treatment of the Ghanaian experience with state corporations is a

¹ Unfortunately neither the method by which it is intended to issue supplementary pages nor their cost is indicated in the binder.

ready manual of one country's experiences. Ghana experimented with a number of public corporations and adopted British theory and precedents when it came to the law surrounding those public corporations. The organ transplant did not take completely and it is instructive to learn what did happen and why. The book does describe in great detail the legal, and in some cases the operating, questions met by the Ghanaian public corporations in trying to cope with emerging management and financial problems. Since little practical information is recorded about these entities, which are rapidly being created around the developing world, this book has useful information and insights into their legal problems.

The book would also be valuable to students and practitioners of business organization, both in the private and public sectors. Since some of the more powerful emerging multinational entities are publicly owned corporations, both in the developed world and the oil-producing countries, the book furnishes some analysis of how those companies can be categorized and dealt with in the future.

HARRY L. FREEMAN

L'harmonisation des législations douanières des Etats membres de la Communauté Economique Européenne. By Patrick Daillier. (Paris: Librairie Générale de Droit et de Jurisprudence, R. Pichon et Durand-Auzias, 1972. Pp. iii, 345. F.48,00.) This study has two basic merits. First, it examines critically and in great detail a highly technical subject, frequently neglected but eminently important for the operation of the EEC. Secondly, it demonstrates in a lucid manner the difficulties the EEC faces and the limits inherent in the harmonization of national legislation in a specific field. This study is an excellent discussion of concrete problems of harmonization of legislation of member states, as set forth by Article 100 of the EEC Treaty.

In the author's view, several obstacles impede such a harmonization. First, the harmonization of the customs legislation of the member states is the result of a compromise between a strictly national and a Community approach in developing an effective customs law. Such a harmonization is carried out by a Community directive only—an act which binds member states as to the objective but leaves the proper choice of means for pursuing it to the states. The shortcoming of such an approach, as compared with the direct effect of a Community regulation in the legal order of the member states, is evident. The Council has therefore availed itself of Article 235 and adopted regulations dealing with specific problems of customs law. Secondly, a harmonization of customs legislation is closely related to common commercial and fiscal policies. Progress in developing such common policies is a precondition of a successful harmonization of national customs legislation. The disproportionate powers the Community enjoys in this field obviously do not facilitate this harmonization. Fiscal barriers limit the benefits of free movement of goods. Thirdly, a harmonization of national customs legislation is impeded by the fact that agricultural products, being subject to a common agricultural policy, are uniformly governed by Community regulations and are thus subject to a special regime.

Finally, the author rightly stresses as one of the obstacles to harmonization the different purpose, nature, and origin of the national customs legislation. And last but not least, he points out the attitude of the national

customs administrations, which play an important part in this development because they apply the customs rules in the absence of a Community customs administration. For this reason, the author rightly emphasizes the great importance of ensuring a uniform interpretation and application of Community rules by national administrative and judicial authorities of the member states, as provided by Article 177 of the EEC Treaty. On this point this reviewer has some reservations about the doubts expressed by the author that the Court has jurisdiction to interpret in a preliminary ruling provisions of directives unless they are directly applicable and establish rights of individuals which national courts are to safeguard. But aside from this point and some others concerning the Community judicial remedies against infringement of Community acts harmonizing national customs legislation, this is a highly competent and realistic study offering a good insight into one of the complex, technical problems of the Community legal order.

G. BEBR

South African Yearbook of International Law, 1975. Volume 1. Published by the Verloren Van Themaat Centre for International Law. (Pretoria: University of South Africa, 1976. Pp. xiv, 247. Index. R 10.) The stated aim of the *South African Yearbook* is "to provide a survey of developments in the sphere of public international law which affect South and Southern Africa, to discuss the juridical aspects thereof, or to comment thereon" (p. xi). Of the six major articles, four deal with topics of general interest which directly involve South Africa: its relations with the United Nations and possible withdrawal; terrorists, POW's, and the state; the first decree of the UN Council for Namibia (here South West Africa); and the Angolan conflict. These articles reflect a point of view which is not governmental but which generally appears to defend the official South African interpretations of international law. The other two articles, one dealing with the exclusive economic zone and one concerning satellite telecommunications and INTELSAT, are well written but provide little information or insight beyond what has appeared in other journals and books.

The volume includes standard sections reporting judicial decisions of international legal significance handed down by South African and foreign courts, as well as the International Court of Justice. There are also brief entries on international conferences, treaties (South African ratifications), literature (book reviews and list of periodical articles), and UN documents which have relevance for South Africa. One additional section of particular interest to international relations students discusses South Africa's foreign policy and international practice for 1975. This presentation which relies heavily on basic speeches and government documents is informative, but unfortunately provides little analysis.

As a reference for those studying South Africa's role in international politics and its attitude towards and practice of international law the *Yearbook* will be useful. It is disappointing, however, to find no genuine dissent within its covers. Perhaps the notes and comments section of future volumes will provide an opportunity for opposing views, for even if the editor feels that other journals have not presented the full range of opinion on these subjects, the *Yearbook* runs the danger, in its present format and perspective, of writing for its own limited audience.

NATALIE K. HEVENEI

BOOKS RECEIVED *

- American Enterprise Institute for Public Policy Research. *The Future of the United Nations*. A Round Table held on November 16, 1976. Washington: AEI, 1977. Pp. ii, 48. \$2.
- Année Africaine 1975*. By the Centre d'Etude d'Afrique Noire de Bordeaux. Paris: Editions A. Pedone, 1976. Pp. 704.
- Annuaire Session de Wiesbaden 1975, Vol. 56. Justitia et Pace*. Institute de Droit International. Basel: Editions S. Karger, SA, 1975. Pp. iv, 595.
- Ärndt, Claus. *Die Verträge von Moskau und Warschau*. Bonn-Bad-Godesberg: Verlag Neu Gesellschaft GmbH, 1973. Pp. 216.
- Atkins, G. Pope. *Latin America in the International Political System*. New York: The Free Press; London: Collier Macmillan Publishers, 1977. Pp. xv, 448. Index.
- Bankers Association for Foreign Trade and Robert Morris Associates. *Preparing a Bank's Written International Lending Policy*. Washington: The Bankers Association for Foreign Trade; Philadelphia: Robert Morris Associates, 1977. Pp. iv, 42. \$6.
- Barton, John H., and Lawrence D. Weiler (eds.) for the Stanford Arms Control Group. *International Arms Control. Issues and Agreements*. Stanford: Stanford University Press, 1976. Pp. ix, 444. Index. \$18.50, cloth; \$12.95, paper.
- Beyer, Sigurd. *Der diplomatische Schutz der Aktionäre im Völkerrecht*. Baden-Baden: Nomos Verlagsgesellschaft, 1977. Pp. 214. DM 54.
- Bogdan, Michael. *Travel Agency in Comparative and Private International Law* (Acta Societatis Juridicae Lundensis Nr. 16). Lund: Studentlitteratur, 1976. Pp. 208.
- Bray, Wayne D. *The Common Law Zone in Panama. A Case Study in Reception*. Puerto Rico: Inter American University Press, 1977. Pp. xxiii, 150. Index. \$20.
- L'Université Libre de Bruxelles (Centre Henri Rolin). *La protection internationale des droits de l'homme*. Brussels: Editions de l'Université de Bruxelles, 1977. Pp. 207. BF.450.
- Buergenthal, Thomas, and Judith V. Torney. *International Human Rights and International Education*. Washington: U.S. National Commission for UNESCO (Dept. of State), 1976. Pp. 211. Index.
- Bull, Hedley. *The Anarchical Society. A Study of Order in World Politics*. New York: Columbia University Press, 1977. Pp. xv, 335. Index. \$20.
- Chiu, Hungdah. *Chinese Attitude Toward Continental Shelf and its Implication on Delimiting Seabed in Southeast Asia*. Baltimore: University of Maryland, 1977. Pp. iv, 32. \$1.
- Colard, Daniel. *Les Relations internationales*. Paris, New York, Barcelona, Milan: Masson, 1977. Pp. 172. F.38.
- Commission to Study the Organization of Peace. *Approaches to Arms Control and Disarmament*. Twenty-Fourth Report of the Commission to Study the Organization of Peace. New York: Commission to Study the Organization of Peace, 1976. Pp. 70. \$2.50.
- Council of Europe. *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights. Volume III: Committee of Experts, 2 February-10 March 1950*. The Hague: Martinus Nijhoff, 1976. Pp. xvii, 339. Index. Gld.130.
- Crabb, John H. (Translator). *The French Civil Code* (as amended to July 1, 1976). South Hackensack: Fred B. Rothman & Co., 1977. Pp. xx, 443. Index. \$60.
- Darby, Joseph J. (Translator). *Alternative Draft of a Penal Code for the Federal Republic of Germany*. Commentary by Jürgen Bauman. South Hackensack: Fred B. Rothman & Co.; London: Sweet & Maxwell, Ltd., 1977. Pp. xvi, 160. \$12.95.
- de Vries, Margaret Garritsen. *The International Monetary Fund 1966-1971. The System Under Stress. Volume I: Narrative; Volume II: Documents*. Washington: In-

* Mention here neither assures nor precludes later review.

- ternational Monetary Fund, 1976. Pp.: Vol. I, xxii, 669. Index. \$11; Vol. II, viii, 339. \$6. \$15 for the set.
- Doi, Teruo, and Warren L. Shattuck (eds.). *Patent and Know-how Licensing in Japan and the United States*. Seattle and London: University of Washington Press, 1977. Pp. x, 430. Index. \$27.50.
- Fierro, Guillermo, J. *La Ley Penal y el Derecho Internacional*. Buenos Aires: Ediciones Depalma, 1977. Pp. xix, 447. Indexes.
- Finley, Blanche. *The Structure of the United Nations General Assembly: Its Committees, Commissions and Other Organisms, 1946-1973. Volumes I, II, and III*. Dobbs Ferry: Oceana Publications, Inc., 1977. Pp. vi, 1463. Index. \$40.
- Fischer, Georges, and Daniel Vignes. *L'Inspection Internationale. Quinze Etudes de la Pratique des Etats et des Organisations Internationales*. Brussels: Etablissements Emile Bruylant, S.A., 1976. Pp. 519. Index.
- Freymond, Jacques, with the collaboration of Nadine Galvani. *La Suisse et la diplomatie multilatérale*. Geneva: Institut Universitaire de Hautes Etudes Internationales, 1976. Pp. 302. Sw.Fr.45.
- Giuliano, M., F. Pocar, and T. Treves. *Codice delle Convenzioni di Diritto Internazionale Privato e Processuale*. Milan: Dott. A. Giuffrè Editore, 1977. Pp. xiii, 1616. L.28,000.
- Hacker, Jens. *Deutsche unter sich. Politik mit dem Grundvertrag*. Stuttgart: Seewald Verlag, 1977. Pp. 192. Index. DM 16.
- International Labour Office. *The Impact of International Labour Conventions and Recommendations*. Geneva: ILO, 1976. Pp. vi, 104. Sw.Fr.20.
- Kahn-Freund, Otto. *General Problems of Private International Law*. Leiden: A. W. Sijthoff, 1976. Pp. ix, 336. Index. Dfl.48, \$19.25.
- Keeton, George W., and Georg Schwarzenberger (eds.). *The Year Book of World Affairs 1977*. London: Stevens & Sons, 1977. Pp. vii, 364. Index. £8.75.
- Kiss, Alexandre Charles. *Survey of Current Developments in International Environmental Law*. Morges, Switzerland: International Union for Conservation of Nature and Natural Resources, 1976. Pp. 140. Index.
- Klemm, Ulf-Dieter. *Die seewärtige Grenze des Festlandsockels Geschichte, Entwicklung und lex lata eine seevölkerrechtlichen Grundprobleme*. Berlin, Heidelberg, New York: Springer Verlag, 1976. Pp. xi, 285. DM 98, \$40.20.
- Kocot, Kazimierz, and Karol Wolfke (eds.). *Wybór Dokumentów do Nauki Międzynarodowego* (3rd ed.). Wrocław and Warsaw: Państwowe Wydawnictwo Naukowe, 1976. Pp. 663.
- Lazerow, Herbert I. *The OECD Draft Influence on United States Income Tax Treaties*. Amsterdam: International Bureau of Fiscal Documentation, 1976. Pp. 83.
- Leontief, Wassily. *The Future of the World Economy* (a United Nations Study). New York: Oxford University Press, 1977. Pp. vii, 110. \$12.95.
- Luard, Evan. *International Agencies: The Emerging Framework of Interdependence*. Dobbs Ferry: Oceana Publications, Inc. for the Royal Institute of International Affairs, 1977. Pp. xii, 338. Index.
- Types of International Society*. New York: The Free Press; London: Collier Macmillan Publishers, 1976. Pp. ix, 389. Index.
- Matte, Nicolas Mateesco (ed.). *International Air Transport: Law, Organization and Policies for the Future*. Proceedings of the Air and Space Law 25th Anniversary Conference, November 17-19, 1976, Faculty of Law, McGill University, Montreal. Toronto: The Carswell Co.; Paris: Editions A. Pedone, 1977. Pp. xi, 172.
- Mayer, Pierre. *Droit International Privé*. Paris: Editions Montchrestien, 1977. Pp. x, 757. F.68.
- Meron, Theodor. *The United Nations Secretariat. The Rules and the Practice*. Lexington and Toronto: Lexington Books, D. C. Heath and Co., 1977. Pp. xvii, 208. Index. \$19.
- Miller, C. J., and P. A. Lovell. *Product Liability*. London: Butterworths, 1977. Pp. xxxix, 386. Index. \$46.20.

- Mische, Gerald and Patricia. *Toward A Human World Order Beyond the National Security Straitjacket*. New York, N.Y. and Ramsey, N.J.: Paulist Press, 1977. Pp. xiii, 399. Index. \$9.95.
- Moore, John Norton (ed.). *The Arab-Israeli Conflict: Readings and Documents*. Abridged and Revised Edition. (Sponsored by the American Society of International Law.) Princeton: Princeton University Press, 1977. Pp. xxxvi, 1285. \$30, cloth; \$13.50, paper.
- Mutharika, A. Peter. *The Regulation of Statelessness Under International and National Law. Texts and Documents*. Dobbs Ferry: Oceana Publications, Inc., 1977. A loose-leaf binder allowing for future supplementation. \$60 (supplementation service extra).
- Netherlands Yearbook of International Law, Volume VII, 1976*. Published under the auspices of the Interuniversity Institute for International Law, T.M.C. Asser Institute. Leiden: A. W. Sijthoff, 1976. Pp. vii, 405. Indexes.
- Orbach, William W. *To Keep the Peace. The United Nations Condemnatory Resolution*. Lexington: University of Kentucky Press, 1977. Pp. vii, 155. Index. \$13.75.
- Patterson, David S. *Toward A Warless World. The Travail of the American Peace Movement 1887-1914*. Bloomington and London: Indiana University Press, 1976. Pp. xi, 339. Index.
- Pelton, Joseph N., and Marcellus S. Snow (eds.). *Economic and Policy Problems in Satellite Communications*. New York, Washington, and London: Praeger Publishers, 1977. Pp. x, 242. Index.
- Pittsburgh University Center for International Studies in conjunction with the Pennsylvania Ethnic Heritage Studies Center. *Ethnic Studies Bibliography. Volume I, 1975. Indexes and Document Descriptions*. Pittsburgh, 1977. Pp. 273.
- Polish Yearbook of International Law VII, 1975*. Wroclaw, Warsaw, Cracow, Danzig: Ossolineum, 1976. Pp. 378.
- Ramos-Lisson, Domingo. *La ley según Domingo de Soto*. (Estudio teológico-jurídico.) Pamplona: Ediciones Universidad de Navarra, S. A., 1976. Pp. 197. Index.
- Raape, Leo, and Fritz Sturm. *Internationales Privatrecht. Band I: Allgemeine Lehren*. Munich: Verlag Franz Vahlen, 1977. Pp. xxix, 478. Index.
- Réalités du Droit International Contemporain (force obligatoire et sujets de droit)*. Actes des seconde et troisième rencontres de Reims. (23-24 Juin 1974; 8-9 Novembre 1975). Reims: Centre d'Etudes des Relations Internationales. Pp. 278.
- Rosas, Allan. *The Legal Status of Prisoners of War. A Study in International Humanitarian Law Applicable in Armed Conflicts*. Helsinki: Suomalainen Tiedakatemia; Academic Bookstore, 1976. Pp. 523. Fmk. 145,35; \$37.
- Rousseau, Charles. *Droit International Public. Tome III: Les compétences*. Paris: Sirey, 1977. Pp. xvi, 635. Index. F.180.
- Schulz, Eberhard (ed.). *Die Ostbeziehungen der Europäischen Gemeinschaft. Von nationalstaatlicher Politik zu gemeinsamer Verantwortung*. Munich and Vienna: R. Oldenbourg Verlag, 1977. Pp. 270. Index.
- Schwarzenberger, Georg, and E. E. Brown. *A Manual of International Law* (6th ed.). South Hackensack: Fred B. Rothman & Co., 1976. Pp. lix, 612. Indexes. \$27.50.
- Sharma, Surya P. *International Boundary Disputes and International Law. A Policy-Oriented Study*. Bombay: N. M. Tripathi Private Limited, 1976. Pp. xvi, 323. Index. Rs.55.
- Sofaer, Abraham D. *War, Foreign Affairs and Constitutional Power: The Origins*. Cambridge, Mass.: Ballinger Publishing Co., 1976. Pp. 533. Index.
- Stoessinger, John G. *The United Nations and the Superpowers: China, Russia, and America*. (4th ed.). New York: Random House, 1977. Pp. 245. Index.
- Sullivan, Jeremiah J. *Pacific Basin Enterprise and the Changing Law of the Sea*. Lexington and Toronto: Lexington Books, D. C. Heath and Co., 1977. Pp. xvii, 218. \$17.
- Szabó, I., and Z. Petri (eds.). *A Socialist Approach to Comparative Law*. Leiden: A. W. Sijthoff; Budapest: Akadémiai Kiadó, 1977. Pp. 235.

- Tesauro, Giuseppe. *Nazionalizzazioni e diritto internazionale*. Naples: Edizioni Scientifiche Italiane, 1976. Pp. 234.
- U.S. Air Force. *International Law—The Conduct of Armed Conflict and Air Operations*. Washington: Department of the Air Force, 1976.
- U.S. Department of State. *Foreign Relations of the United States 1950. Volume VI: East Asia and the Pacific*. (Dept. of State Pub. 8858). Pp. x, 1581. Index. \$16.
- U.S. Department of State. *Volume VII: Korea*. (Dept. of State Pub. 8859). Pp. xiii, 1675. Index. \$17.
- Washington: U.S. Govt. Printing Office, 1976.
- Verzijl, J. H. W. *International Law in Historical Perspective. Part VIII: Inter-State Disputes and Their Settlement*. Leiden: A. W. Sijthoff, 1976. Pp. ix, 646. Index. \$65.
- Wallace, Don, Jr., and Helga Escobar (eds.). *The Future of International Economic Organizations*. New York and London: Praeger Publishers, 1977. Pp. xii, 184. Index.
- Wallenstein, Gerd D. *International Telecommunication Agreements. Volume I*. Dobbs Ferry: Oceana Publications, Inc., 1977. Looseleaf Service (with supplementation to be announced). \$75 per volume (3 vols. projected).
- Williams, Jeremy S. *The Law of Defamation in Canada*. Toronto: Butterworths, 1976. Pp. x, 176. Index.

OFFICIAL DOCUMENTS

UNITED STATES: FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

Public Law 94-583
94th Congress

An Act

To define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Sovereign Immunities Act of 1976."

SEC. 2. (a) That chapter 85 of title 28, United States Code, is amended by inserting immediately before section 1331 the following new section:

“§1330. Actions against foreign states

“(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

“(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

“(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.”

(b) By inserting in the chapter analysis of that chapter before—

“1331. Federal question; amount in controversy; costs.”

the following new item:

“1330. Action against foreign states.”

SEC. 3. That section 1332 of title 28, United States Code, is amended by striking subsections (a) (2) and (3) and substituting in their place the following:

“(2) citizens of a State and citizens or subjects of a foreign state;

“(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

“(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.”

SEC. 4. (a) That title 28, United States Code, is amended by inserting after chapter 95 the following new chapter:

“Chapter 97.—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

“Sec.

“1602. Findings and declaration of purpose.

“1603. Definitions.

“1604. Immunity of a foreign state from jurisdiction.

“1605. General exceptions to the jurisdictional immunity of a foreign state.

“1606. Extent of liability.

“1607. Counterclaims.

“1608. Service; time to answer default.

“1609. Immunity from attachment and execution of property of a foreign state.

“1610. Exceptions to the immunity from attachment or execution.

“1611. Certain types of property immune from execution.

“§1602. Findings and declaration of purpose

“The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

“§1603. Definitions

“For purposes of this chapter—

“(a) A ‘foreign state,’ except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

“(b) An ‘agency or instrumentality of a foreign state’ means any entity—

“(1) which is a separate legal person, corporate or otherwise, and

“(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

“(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

“(c) The ‘United States’ includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

“(d) A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

“(e) A ‘commercial activity carried on in the United States by a foreign state’ means commercial activity carried on by such state and having substantial contact with the United States.

“§1604. Immunity of a foreign state from jurisdiction

“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

“§1605. General exceptions to the jurisdictional immunity of a foreign state

"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

"(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

"(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

"(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

"(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

"(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

"(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

"(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

"(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided, That*—

"(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notices; and

"(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against

the foreign state which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

"§1606. Extent of liability

"As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

"§1607. Counterclaims

"In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

"(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

"(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

"(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

"§1608. Service; time to answer; default

"(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

"(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

"(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

"(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

"(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a 'notice of suit' shall mean a notice addressed

to a foreign state and in a form prescribed by the Secretary of State by regulation.

“(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

“(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

“(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

“(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

“(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

“(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

“(C) as directed by order of the court consistent with the law of the place where service is to be made.

“(c) Service shall be deemed to have been made—

“(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

“(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

“(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

“(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

“§1609. Immunity from attachment and execution of property of a foreign state

“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

“§1610. Exceptions to the immunity from attachment or execution

“(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

“(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, not-

withstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

"(2) the property is or was used for the commercial activity upon which the claim is based, or

"(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

"(4) the execution relates to a judgment establishing rights in property—

"(A) which is acquired by succession or gift, or

"(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

"(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

"(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

"(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

"(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

"(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

"(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

"(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

"(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

"§1611. Certain types of property immune from execution

"(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to,

or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

“(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

“(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

“(2) the property is, or is intended to be, used in connection with a military activity and

“(A) is of a military character, or

“(B) is under the control of a military authority or defense agency.”

(b) That the analysis of “PART IV.—JURISDICTION AND VENUE” of title 28, United States Code, is amended by inserting after—

“95. Customs Court.”,

the following new item:

“97. Jurisdictional Immunities of Foreign States.”

SEC. 5. That section 1391 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

“(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

“(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

“(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

“(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

“(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.”

SEC. 6. That section 1441 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

“(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.”

SEC. 7. If any provision of this Act or the application thereof to any foreign state is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SEC. 8. This Act shall take effect ninety days after the date of its enactment.

Approved October 21, 1976.

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AFTER THE FALL: THE NEW PROCEDURAL FRAME- WORK FOR CONGRESSIONAL CONTROL OVER THE WAR POWER

By Thomas M. Franck *

I.

INTRODUCTION

The Vietnam "war" was fought to preserve the balance of power between the non-Communist and Communist worlds. To the extent the global power equation ever rested on the outcome of that struggle, it cannot be judged a success for our side. In the process, however, another balance has also been altered, perhaps far more significantly: that between Congress and the Presidency in the conduct of foreign relations. Some would say that the Administration's failure to win in Vietnam, together with the backwash of Watergate, created the opportunity for a long overdue redress in the constitutional balance of power between the branches. Others argue that the result has been to cripple the Executive's ability to respond to the challenges of our era and to perform America's role as leader of the free world.¹ None would deny that the rules relating to the conduct of foreign relations have been fundamentally altered or restored to something nearer the classic intent of the Constitution's framers.

The years 1973 to 1977 bristle with instances of congressional renaissance. Repeal of the Tonkin Gulf Resolution,² the unprecedented cutoff of funding for the aerial war over Cambodia,³ termination of military assistance and sales to Turkey after its invasion of Cyprus,⁴ the ban on CIA activity

* Of the Board of Editors.

The author wishes to express his appreciation to Professors Edward Weisband and Michael Glennon, as well as to Chris Johnson, for extensive and invaluable assistance in the researching of this article.

¹ These and other positions are outlined in a panel on Treaties and Executive Agreements held at the 1977 Annual Meeting of the American Society of International Law, 71 ASIL PROC. 235 (1977). See also Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1 (1975). Contrast: *War Powers of the President and the Congress*, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, 1973, at 551 (A. Rovine ed.); Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEXAS L. REV. 833 (1972).

² Act of Jan. 12, 1971, Pub. L. No. 91-672, §12, 84 Stat. 2053.

³ Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia.

The Joint Resolution Continuing Appropriations for Fiscal Year 1974, Pub. L. No. 93-52, §108, 87 Stat. 134 (1973). See also Act of July 1, 1973, Pub. L. No. 93-50, §307, 87 Stat. 129.

⁴ Act of Oct. 17, 1974, Pub. L. No. 93-448, §6, 88 Stat. 1363, as amended by Act of Dec. 31, 1974, Pub. L. No. 93-570, §6, 88 Stat. 1867.

in the Angolan civil war⁵—these are the most visible and controversial first fruits of the mood of congressional assertiveness. Senators like Case, Clark, Javits, Kennedy, and Cranston and Representatives Zablocki, Brademas, Fraser, Rosenthal, Findley, and Bingham, among others, have actively begun to *make* foreign policy at the head of congressional alliances and supported by large and growing professional staffs of foreign policy specialists.

Even more significant and fundamental, however, are the *procedural* changes wrought by Congress during this same period. The Cambodian, Turkish, and Angolan "sub-games" have been won or lost and, while their outcomes will no doubt continue indirectly to influence U.S. foreign relations, they are over. Attention has turned to other crises, different agendas. Firmly in place, however, are the changes made since 1973 in the procedure by which foreign relations are conducted, realities perceived and evaluated, choices made and options exercised. Of paramount importance among these innovations is the War Powers Resolution of 1973, which seeks to transform the process by which the United States is drawn into military hostilities. Others pertain to oversight over the conduct of CIA operations,⁶ military sales,⁷ the making of executive agreements,⁸ and economic assistance abroad.⁹

The result of all these changes is that Congress, hereafter, means again to be central to decisions as to when and where to use force, to make foreign commitments, and to provide economic and military succor. Not even a change in Administration is likely to have restored the era of congressional abdication and presidential paramountcy. While the fortunes of Presidency and Congress are subject to historic swings of the pendulum, it is probable that a degree of congressional activism, having been institutionalized by the new laws, is here to stay for the foreseeable future.

That most recent historic shift is the subject of this article. Since the War Powers Resolution¹⁰ is both the first and—politically as well as equally—the most fundamental and thus controversial of the new procedural devices for reasserting congressional power over U.S. foreign relations, this discussion has focused upon it. It is the contention of the author that the War Powers Resolution is an important part of a healthy redress in the adversary or balance of power system which informs our democracy but also that it has proven a flawed instrument, one which could benefit from reconsideration and reform.

⁵ Foreign Assistance and Related Programs Appropriations Act, Pub. L. No. 94-330, §109, 90 Stat. 711 (1976); International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, §404, 90 Stat. 729 (1976).

⁶ Resolution to Establish a Standing Committee of the Senate on Intelligence, and for Other Purposes, S.Res. 400, 94th Cong., 2d Sess., 122 CONG. REC. 253 (1976).

⁷ International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (1976).

⁸ 1 U.S.C. §112(b) (Supp. V 1975).

⁹ Foreign Assistance Act of 1961, 22 U.S.C. §2151 (Supp. V 1975). Section 116, 22 U.S.C. §2151n, dealing with congressional supervision over the application of human rights standards, was added by Act of Dec. 20, 1975, Pub. L. No. 94-161, §130, 89 Stat. 849.

¹⁰ 50 U.S.C. §1541 (Supp. V 1975).

II.

THE WAR POWER IN HISTORICAL PERSPECTIVE

The war power is unambiguously located in the constitutional scheme of divided government by Article 1, Section 8, which grants Congress the exclusive initiative "to declare War" and to "raise and support Armies." It also assigns Congress responsibility for "calling forth the Militia to . . . repel Invasions." The powers to summon force for repelling invasions, as well as to "execute the Laws of the Union" and to "suppress Insurrections," according to a recent study, were meant also to give Congress "control of those types of military action short of formal war commonly resorted to during that time."¹¹ Reinforcing these specific powers is the ultimate "power of the purse" given to Congress by Article 1, Section 9, clause 7. In addition, Article 1, Section 8, gives to Congress the power "to lay and collect Taxes . . . to . . . provide for the common Defense. . . ."

Against all this must be set the Constitution's grants to the President. A presidential role in the conduct of foreign relations is specified in Article 2, Section 3, which instructs the chief executive to "receive Ambassadors and other public Ministers."¹² The power to conduct diplomacy, in practice, subsumes the power to engender hostilities. The same section provides that "he shall take Care that the Laws be faithfully executed." Since treaties, by Article 6, are part of the "supreme Law of the Land," the President is also obliged to give them effect. Arguably, this duty extends even to treaties of alliance that commit the nation to the defense of its allies. Finally, Article 2, Section 2, gives the President authority as "Commander in Chief of the Army and Navy of the United States. . . ."

The "Commander in Chief" designation is vague yet pregnant. Alexander Hamilton, in Federalist Number 69, thought it "would amount to nothing more than the supreme command and direction of the military and naval forces as first General and admiral of the Confederacy" and contrasted this to the power of the British King to declare war, raise and regulate the fleets and armies "all of which, by the Constitution under consideration, would appertain to the legislature." The records of the Convention are singularly bereft of debate on the matter—which, itself, may reinforce the minimalist view.¹³ Nevertheless, the Commander in Chief function may have come to mean more to the constitutional drafters than their silence suggests. As with so much in the Constitution, the interpretation of one clause may be partly deduced by reference to limits

¹¹ A.D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 4 (1976).

¹² President Washington quickly seized the diplomatic reins. On October 9, 1789, he replied to a letter the King of France had addressed to "the President and Members of the General Congress of the United States" by pointing out that the honor of receiving and answering such communications, by virtue of the new constitutional arrangement, "has devolved upon me." 30 *THE WRITINGS OF GEORGE WASHINGTON* 431-32 (J. Fitzpatrick ed., 1931-44).

¹³ Totally missing was any debate that would have accompanied an understanding of the commander-in-chief clause as creating an undefined reservoir of power to use the military in situations unauthorized by Congress. SOFAER, *supra* note 11, at 36.

imposed on countervailing powers. Thus, it is notable that James Madison and Elbridge Gerry moved, during the August 17, 1787, meeting of the Constitutional Convention, to substitute the word "declare" for "make" in the congressional war power clause. Their intended effect was to leave the Executive not only the actual execution of wars once declared by Congress but also "the power to repel sudden attacks" even, apparently, in the absence of such a declaration.¹⁴

Another necessary implication favoring the Commander in Chief is deduced from Article I, Section 10, of the Constitution which permits the states to engage in war, even if not declared by Congress, in the event of an actual invasion "or in such imminent Danger as will not admit of delay." Since the drafters appear to have accommodated that exception to the congressional warmaking monopoly, it is arguable that they could not have intended to withhold from the President as Commander in Chief what they willingly accorded the several states.

History and practice also lend weight to such an interpretation. Professor Henkin summarizes this argument drawn from historic practice:

Without a Congressional declaration of war, the power of the President to use the troops and do anything else necessary to repel invasion is beyond question; Wilson even claimed the right to strike deep in Mexico. The President has power not merely to take measures to meet the invasion, but to wage in full the war imposed upon the United States. In our day of instant war, all assume that the President would have the power to retaliate against a nuclear attack . . . ; probably, he has authority also to anticipate by a preemptive strike an attack he believes imminent.¹⁵

According to Professor Abram Chayes of Harvard: "Even in 1789, the declaration of war was already a decaying formality."¹⁶ Studies indicate that during the century preceding the Constitutional Convention "wars were frequent, but very seldom declared."¹⁷

Even during Washington's term Congress conferred broad discretion on the President to use armed force at sea against Britain and France, as in the Act of June 5, 1794, "for the punishment of certain crimes against the United States."¹⁸ During the presidency of John Adams the undeclared

¹⁴ I. FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 318-19 (1937).

¹⁵ L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 52 (1972).

¹⁶ Statement in *Congress, the President, and the War Powers: Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. 135-67, at 137 (1970).

¹⁷ SOFAER, *supra* note 11, at 56. Cited for this proposition are: J. MAURICE, *HOSTILITIES WITHOUT DECLARATION OF WAR* (1883); C. VER STEEG, *THE FORMATIVE YEARS*, 288-300 (1964); R. WARD, *AN ENQUIRY INTO THE MANNER IN WHICH THE DIFFERENT WARS IN EUROPE HAVE COMMENCED* (1805).

¹⁸ SOFAER, *supra* note 11, at 116. Much more extensive were the military expeditions against the Wabash Indians undertaken by St. Clair which were authorized by the President, but not by Congress. According to Sofaer: "The offensive actions taken against the Wabash were not expressly authorized by a declaration of war or by legislation." *Id.* 122. Indeed, the prevailing argument against those who, in Congress, complained that the war had dragged on for three years, squandering millions to no known purpose, was that "it is now too late to inquire whether the war was originally undertaken on the principles of justice or not. We are actually involved in it, and cannot recede, without exposing numbers of innocent persons to be butchered

"quasi-war" with France dominated U.S. foreign policy. Secretary of War James McHenry recommended the policy of undeclared war as a way of circumventing popular opposition to conflict with France among the Republicans in Congress and the public. "A mitigated hostility," he wrote, would "be the most likely to fall in with the general feeling, while it leaves a door open for negotiation, and secures some chances to avoid some of the extremities of a formal war."¹⁹ Accordingly, war against France proceeded in part on presidential initiatives, such as the arming of merchant vessels, and in part on congressional legislation but without a congressional declaration. In *Bas v. Tingy* the U.S. Supreme Court recognized the legality of these "mitigated hostilities."²⁰

Such common law wars have become commonplace. A chronology prepared by Professor J. T. Emerson documents 199 U.S. military engagements abroad undertaken between 1798 and 1972 without a declaration of war.²¹ Nor were they mostly trivial or local engagements. Of the operations he lists, 97 lasted more than 30 days and 103 took place outside the Western Hemisphere. In the naval war with France between 1798 and 1800 and in 80 other hostilities the commitment of U.S. forces was initiated, arguably, under color of prior legislative authority. In 1846, however, President Polk, without any such color of authority, sent American forces into disputed territory between Corpus Christi and the Rio Grande River, thereby initiating the Mexican War.

In that instance, and in many since, it has been urged by the Executive that subsequent authorizations and appropriations of funds for war constitute sufficient congressional approval of, and control over, the conduct of hostilities. There is some authority for the proposition. The ratifiers of the Constitution, according to Professor Sofaer,

did convey a strong impression that a military appropriation, passed for a specific purpose, could constitute legislative approval for the use of the force authorized to accomplish the purpose contemplated. This seems implicit in the frequent references to the power over appropriations as a legitimate and overwhelmingly effective legislative device for preventing any action or policy attempted by the executive.²²

In recent years, this implied consent of Congress to presidential war-making has been located even in quite general appropriations for the military and for national defense, despite some judicial opinion to the contrary.²³

by the enemy." 3 ANNALS OF CONGRESS 345 (1792), cited in SOFAER, *supra*. Also not authorized by Congress was the communication sent in 1794 by Henry Knox, Washington's Secretary of War, instructing General Wayne to use military force if necessary against the British garrison at Fort Miamis. *Id.* 124-27.

¹⁹ THE LIFE AND CORRESPONDENCE OF JAMES MCHENRY 291-95 (B. STEINER ed. 1907), cited in SOFAER, *supra* note 11, at 142.

²⁰ Justice Bushrod Washington wrote: "Every contention by force, between two nations, in external matters, under the authority of their respective governments, is not only war but public war." 4 U.S. (4 Dall.) 37, 39 (1800).

²¹ Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53, 88-119 (1972).

²² SOFAER, *supra* note 11, at 57.

²³ In *Mitchell v. Laird* the majority of the U.S. Court of Appeals for the District of Columbia held that congressional appropriations, extension of the draft, and other

The Senate Foreign Relations Committee has attempted to distinguish between earlier precedents and those of more recent years.

During the 19th century American Armed Forces were used by the President on his own authority for such purposes as suppressing piracy, suppressing the slave trade by American ships, "hot pursuit" of criminals across frontiers, and protecting American lives and property in backward areas or areas where government had broken down. Such limited uses of force without authorization by Congress, not involving the initiation of hostilities against foreign governments, came to be accepted practice, sanctioned by usage though not explicitly by the Constitution.²⁴

However, the use of the armed forces against *sovereign nations* without authorization by Congress only became common practice in the 20th century. The Committee, despite the earlier Polk precedent, argued that the current trend originated with President Theodore Roosevelt's use of the Navy to prevent Colombia from reasserting jurisdiction over its rebellious province of Panama and his interventions in Cuba and the Dominican Republic, and was reinforced by Presidents Taft's and Wilson's use of armed force in the Caribbean and Central America without congressional authorization followed by the establishment of American military governments in Haiti, the Dominican Republic, and Nicaragua. Wilson's unauthorized seizure of the Mexican port of Vera Cruz in 1914 to "enforce respect" for the Government of the United States and his dispatch of an armed force under General Pershing into Mexico in "hot pursuit" of the bandit Pancho Villa, initiating a war which lasted almost two years,²⁵ are held by the Committee to be the precursors of President Truman's entry into the three-year Korean war in response not to a congressional mandate but to a recommendation of the Security Council of the United Nations.²⁶

After Korea, presidential warmaking has become the rule. In 1958, President Eisenhower sent 14,000 soldiers into Lebanon, this time without authorization either by Congress or the United Nations, an example followed in 1965 by President Johnson with the dispatch of 22,000 U.S. troops to the Dominican Republic.²⁷

The Congress now asserts that this chronicle of practice has no legal validity and that a practice—even a long-standing and relatively consistent one—cannot make constitutional that which is expressly prohibited by the

legislation did not constitute assent to the war. 488 F. 2d 611, slip op. at 615 (D.C. Cir. 1973).

²⁴ SENATE COMM. ON FOREIGN RELATIONS, 91st CONG., 2d SESS., DOCUMENTS RELATING TO THE WAR POWER OF CONGRESS, THE PRESIDENT'S AUTHORITY AS COMMANDER-IN-CHIEF AND THE WAR IN INDOCHINA, 13-14. (Comm. Print 1970).

²⁵ *Id.* 14-15.

²⁶ SC. Res. 84, 5 SCOR, RES. & DEC. 5 (1950).

²⁷ Eventually, the Organization of American States provided a vestige of legitimation by agreeing to participate in an Inter-American Peace Force. Text in 52 DEPT. STATE BULL. 862-63 (1965). This resolution establishing the Inter-American Force was passed by the Tenth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States on May 6, 1965, by a vote of 15-5 with one abstention.

Constitution. This new assertiveness dates from the declining years of the Vietnam war and is undoubtedly motivated, in part, by its failure to secure U.S. interests. Yet the Vietnam war is less clearly an instance of executive arrogation of the war power than earlier post-World War II cases. In August 1964, at the request of President Johnson following an alleged attack on American naval vessels in the Gulf of Tonkin, Congress passed the Gulf of Tonkin Resolution, unanimously in the House and by a vote of 88 to 2 in the Senate.²⁸ The resolution expressed approval and support of "the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." It also provided that the United States is "prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." South Vietnam was such a protocol state. Thus the U.S. escalation, in response to Saigon's requests, was authorized by Congress—at least initially by the resolution but probably also later by the consent implicit in the voting of appropriations²⁹—as effectively, in any event, as the naval encounters with France during the second decade of the Republic.

Still, scale has its own logical imperatives. The Vietnam war came to absorb millions of men over a ten-year period. And it was a military fiasco, making it both inevitable and opportune to reexamine the evolution of constitutional precedents and to reconsider their utility. The result has been a constitutional neoclassical revival, with Congress attempting to strip away two centuries of embroidery applied to the pillars of the Constitution by presidential initiative and congressional acquiescence.

III.

THE FIGHT FOR CONGRESSIONAL CONTROL OVER WARMAKING: 1969-1973

The struggle to enact legislation limiting the President's discretion to commit U.S. military forces abroad has taken the form of a three-cornered contest between the President, the House of Representatives, and the Senate. The first successful venture came in 1969 when the Senate adopted a resolution declaring that a national commitment could result "only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment."³⁰ While this resolution, lacking approval by the House

²⁸ Pub. L. No. 88-408, 78 Stat. 384 (1964).

²⁹ Note, however, *Mitchell v. Laird*, wherein the court said:

This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war.

488 F.2d 611, slip op. at 615 (D.C. Cir. 1973).

³⁰ S.Res. 85, 91st Cong., 1st Sess., 115 CONG. REC. 17245 (1969).

and President, did not have the force of law, it was the opening round in the campaign of Congress to participate in any future commitments of U.S. forces or mutual defense guarantees.

Meanwhile, the House of Representatives went its own, less militant, way. In 1970 and 1971, it passed H.J.Res. 1355 and H.J.Res. 1, respectively. These bills, had they become law, would have required the President to issue reports to Congress *after* committing forces to combat. They did not assert congressional authority either to commence or terminate a commitment or operation undertaken pursuant to a commitment. The less docile Senate refused to pass either bill and instead approved S. 2956 in 1972. This attempted a detailed restatement of the limits of the constitutional powers of the Commander in Chief. Presidential authority to introduce U.S. armed forces into hostilities was to apply solely to situations in which he was (1) repelling or anticipating an armed attack upon the United States, its territories, and possessions; (2) responding to an attack against the armed forces of the United States, wherever located, or forestalling an imminent threat of such an attack against the United States or its armed forces; (3) protecting U.S. citizens and nationals while they were being evacuated from abroad; or (4) acting pursuant to specific statutory authorization. Even when the President was acting under one of these four authorizations, S. 2956 provided that the executive discretion to use force would terminate at the end of 30 days unless Congress, through legislation, specifically authorized further involvement. The bill also provided for terminating presidential use of force at any time, even within the 30-day period, by act or a joint resolution of Congress.

Due to the inability of the two bodies to find a common basis for agreement, the Senate bill died in conference in 1972, together with the House version. In 1973, House militancy began to catch up with the other Chamber. While the Senate proceeded with S. 440, a bill virtually identical to S. 2956, the House passed H.J.Res. 542, which still differed considerably from the Senate version but was much stronger than its progenitors. In at least one respect, H.J.Res. 542 was even more assertive than its Senate counterpart. Unlike S. 440, it did not enumerate the circumstances in which the President could exercise his authority as Commander in Chief to involve U.S. forces in hostilities absent a declaration of war, but did provide that, within 48 hours of making such a commitment, the President must report to Congress and that, within 120 calendar days thereafter, the commitment of U.S. forces must terminate unless Congress enacts a declaration of war or specific authorization. And most significant of all, the new House bill sanctioned termination of an operation at any time, before or after the expiration of the 120-day period, "by concurrent resolution." Thus was introduced the "congressional veto," a legislative device to vitiate the presidential veto.

On July 18, 1973, the House passed H.J.Res. 542 by a vote of 244 to 170, despite President Nixon's promise to veto it. On July 20, 1973, the Senate, by 72 to 18, passed S. 440. Thereafter the two bills went to conference and on October 4 a text emerged more closely approximating the House

(Morgan-Zablocki) than the Senate (Javits) version.³¹ Gone was the Senate's exhaustive enumeration of instances when the Commander in Chief could use force without congressional authorization. In its place was a more general statement of "Purpose and Policy" in Section 2 of the bill. Subsection (c) states that:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

On its face, this somewhat resembles the Senate version, but, according to the Joint Explanatory Statement of the Committee of Conference: "Subsequent sections of the joint resolution are not dependent upon the language of this subsection, as was the case with a similar provision of the Senate bill (§3)." ³² It is thus possible to discount the enumerations as declaratory but not binding on Congress, the President, or the courts. The enumeration, moreover, could not be taken to be binding because it is plainly not exhaustive. Gone is reference to presidential power to rescue citizens endangered abroad. More significantly, the enumeration does not envisage presidential discretion to use force in anticipation of an imminent attack, an omission which could be neither constitutionally nor logically justified except on the ground that Section 2 is illustrative rather than definitive.

The effect of this change, according to skeptics, has been to give the President an unlimited license to engage in short wars. How short these wars must be was, itself, the subject of further compromise. Conferees resolved the difference between the Senate's 30-day cutoff and the House's 120-day grace period by authorizing 60 days during which the President could use force without a prior declaration of war or specific congressional authorization, together with an additional 30-day extension if necessary to effect the safe withdrawal of U.S. troops. At the same time, however, the conferees also accepted the House provision for termination of U.S. involvement by concurrent, rather than joint, resolution. Since the concurrent resolution process can be invoked at any time and is immune to presidential veto, the result was to authorize a majority of both Houses to terminate any undeclared war as soon as it begins or at any time thereafter. Since the Section 2 enumeration is not determinative, it appears that these termination provisions in Sections 5(b) and (c) can be invoked after the commencement of any hostilities, and for any reason, be it legal, strategic, or political. This powerful package, as reported out of conference, was passed by the Senate on October 10 by a vote of 75 to 20 and by the

³¹ H.R. REP. NO. 547, 93d Cong., 1st Sess. (1973).

³² SUBCOMM. ON INTERNATIONAL SECURITY AND SCIENTIFIC AFFAIRS OF THE HOUSE COMM. ON INTERNATIONAL RELATIONS, 94th CONG., 1st Sess., THE WAR POWERS RESOLUTION: RELEVANT DOCUMENTS, CORRESPONDENCE, REPORTS 13 at 14. (Comm. Print 1975) [hereinafter cited as WAR POWERS RES.: RELEVANT DOCS.].

House of Representatives on October 12 by 238 to 123, a majority, in the case of the House, not quite large enough to override the expected presidential veto.

That veto came on October 24, 1973. Given the odds against overriding it, Representative Clement Zablocki, the House sponsor, quietly prepared a "brave face" statement asserting that, while Congress had "lost an opportunity to restrain growing presidential usurpation," it had clearly signaled the President "that the great majority of Congress wants and expects its rightful role in the decisions of war and peace."³³ The statement was never used because on November 7 the House did succeed in overriding the veto by a vote of 284 to 135, four more than necessary, and the Senate followed its example by an overwhelming 75 to 18. In the intense campaign to enlist last minute support, the bill's sponsors made effective use of President Nixon's gathering Watergate troubles, arguing that this was no time to forego the opportunity to hand the President a significant defeat.³⁴

The War Powers Resolution raises a number of important issues: (1) What is the nature of the President's duty to consult with Congress? (2) What is the resolution's effect on the "inherent" constitutional powers of the President to use force either beyond the 60/90-day period in the absence of congressional endorsement or in the face of a congressional concurrent resolution to terminate an operation? (3) Is the concurrent resolution or "congressional veto" provision a constitutional exercise of the law-making power? (4) What is the effect of the resolution on U.S. commitments under mutual security obligations and the North Atlantic Treaty, in particular?

IV.

THE DUTY TO CONSULT AND TO REPORT: THE WAR POWERS RESOLUTION IN PRACTICE

The resolution requires the President "in every possible instance" to "consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" and to "consult regularly with the Congress until [they] are no longer engaged. . . ." ³⁵ The President is also required to "submit within 48 hours . . . a report, in writing . . ." to both Houses of Congress, whenever, in the absence of declared war, armed forces "are introduced . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" or "into the territory, airspace or waters of a foreign nation, while equipped for combat. . . ." ³⁶ That report must set out the circumstances necessitating

³³ Statement of Hon. Clement J. Zablocki (unpublished).

³⁴ T. F. EAGLETON, *WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER* 220 (1974).

³⁵ Section 3, 50 U.S.C. §1542 (Supp. V 1975).

³⁶ *Id.* §1543(a) (1) and (2).

the intervention, its constitutional or legislative authority, as well as its estimated scope and duration.³⁷

Has the President complied so far? There are four instances—and, perhaps, a fifth—to provide some guidance on how the arrangement is working in practice.

On April 4, 1975, as Vietnamese lines began to crumble, President Ford dispatched U.S. naval vessels and an amphibious task group with twelve helicopters and approximately 700 Marines to the coast of Vietnam to transport refugees from embattled Danang and other seaports to "safer" areas farther south. A report to Congress was made, but its timing is instructive. It is dated April 4, a Friday, but begins "[a]s you know, last Saturday I directed United States participation in an international humanitarian relief effort . . ." ³⁸ and notes that the "first vessels entered South Vietnam territorial waters at 0400 A.M. EDT on April 3, 1975." The President correctly interpreted his responsibility to report to Congress within 48 hours as commencing only with the actual arrival of the first military vessels in South Vietnamese territorial waters, not with the decision to dispatch them to the combat zone. Thus the report to Congress was of no significance in giving that body a role in a decision which—had the Hanoi regime chosen so to treat it—could have marked the beginning of a new military conflict between it and the United States.

The fact that this operation did not involve "hostilities" ³⁹ exempted it from Section 4(a)(1) of the resolution and brought it under Section 4(a)(2), which meant that no report was required until 48 hours after U.S. troops had entered the territorial jurisdiction of Vietnam and, more significantly, that the executive was not legally required to consult with Congress under Section 3. The then Legal Adviser of the Department of State took the position—again correctly, given the drafting of the resolution—that "[n]o . . . prior consultation is contemplated under section 3 when the action to be reported under section 4(a) fits within subparagraphs 2 and 3" ⁴⁰ as opposed to Section 4(a)(1), *i.e.*, when U.S. forces are introduced into the "territory, airspace or waters of a foreign nation, while equipped for combat" but not into actual or "imminent" hostilities. Thus the President was not obliged to consult by the War Powers Resolu-

³⁷ *Id.* §1543(a) (A), (B) and (C).

³⁸ WAR POWERS RES.: RELEVANT DOCS., *supra* note 32, at 40-41; excerpted from Report Dated April 4, 1975, From President Gerald R. Ford to Hon. Carl Albert, Speaker of the House of Representatives, in Compliance With Section 4(a)(2) of the War Powers Resolution.

³⁹ According to the Legal Adviser:

. . . "hostilities" was used to mean a situation in which units of the U.S. Armed Forces are actively engaged in an exchange of fire with opposing units of hostile forces, and "imminent hostilities" was considered to mean a situation in which there is a serious risk from hostile fire to the safety of U.S. forces.

*War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident, Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 94th Cong., 1st Sess. 85 (1975) [hereinafter cited *Hearings, War Powers: Test of Compliance*].*

⁴⁰ *Id.* 3.

tion because the Danang evacuation, technically, was a peaceful humanitarian rescue, not an operation involving hostilities under Section 4(a)(1). This follows even though the U.S. intervention was peaceful only because Hanoi chose not to make it otherwise. The experience ought to be taken as an indication that something is amiss. If Congress is to be consulted and kept informed on the introduction of forces into hostilities, it also ought to play a part in the process leading to a decision to send U.S. troops into a war zone for what may or may not turn out to be peaceful purposes. That, however, would require amendment of the resolution.

Although the Legal Adviser admitted no obligation to do so, the President, as a voluntary gesture, "directed prior consultation with Congress"⁴¹ in the Danang case. Consultation was stated to have occurred on March 30, and to have involved "the members of the Senate and House leadership."⁴² According to the Legal Adviser, the leadership was "notified and informed prior to the actual commencement of the introduction of armed forces, although consultation was not technically called for. . . ."⁴³ In the view of Congressman Clement Zablocki, then Chairman of the House International Relations Committee's Subcommittee on International Security, "[t]here was a report, but there was not consultation."⁴⁴ He distinguished between "notification, which occurred, and consultation, which did not." Privately, other congressional leaders have concurred.

The second case followed almost at once. A similar letter was sent to Congress on April 12, 1975, by the President reporting on the deployment of U.S. military forces, including 350 ground combat troops of the U.S. Marines, 36 helicopters and supporting tactical air and command elements, to assist in the evacuation of U.S. nationals from Cambodia shortly before the fall of Phnom Penh. The majority of those evacuated were, in fact, Cambodians, including employees of the U.S. Government.⁴⁵

Again, on April 28, after the disintegration of Saigon's defense perimeter, the President, in the words of the Legal Adviser, directed that congressional leaders be notified (not consulted)—"that the final phase of the evacuation of Saigon would be carried out by means of military forces within the next few hours."⁴⁶ A U.S. force of 70 helicopters and 865 Marines arrived in Saigon at 1:00 a.m. on April 29 to evacuate 1,373 U.S. citizens and 5,595 South Vietnamese. This time, however, some fighting was involved.⁴⁷ Only at 11:30 a.m., after the operation had reached the point of no return, did the President meet with congressional leaders at the White House for what the Legal Adviser described as "a further briefing on the situation in Saigon."⁴⁸ If the test of the War Powers Resolution

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* 7.

⁴⁴ *Id.* 82.

⁴⁵ *Id.* 5-6; excerpted from Report Dated April 12, 1975, From President Gerald R. Ford to Hon. Carl Albert, Speaker of the House of Representatives, in Compliance With Section 4(a)(2) of the War Powers Resolution.

⁴⁶ *Id.* 6.

⁴⁷ Report Dated April 30, 1975, From President Gerald R. Ford to Hon. Carl Albert, Speaker of the House of Representatives, in Compliance With Section 4 of War Powers Resolution. *Id.* 7.

⁴⁸ *Id.* 6.

is its effectiveness in adding congressional voices to the councils in which war/peace decisions are made; none of these three cases, marginal as they are, gives cause for great satisfaction.

Neither, it must be added, did these episodes involve serious combat activity, so delay in informing Congress and lack of consultation with its leaders is perhaps not particularly onerous or even indicative. The same could not be said of the *Mayaguez* incident. That U.S. merchant vessel was seized on May 12, 1975, in the Gulf of Siam, reportedly 60 miles off the Cambodian coast but only 6½ miles from the Wai Islands, a small group of rocky islets claimed by both Cambodia and Vietnam. In responding to the Cambodian provocation, the presidential discretion as Commander in Chief was confronted by two congressional enactments—the War Powers Resolution, with its requirement for prior consultation in Section 3, and Section 30 of the Foreign Assistance Act of 1973 which provided that: “No funds authorized or appropriated under this or any other law may be expended to finance military or paramilitary operations by the United States in or over Vietnam, Laos or Cambodia.”⁴⁹ Six other provisions in laws similarly prohibited the use of funds to finance “combat activities” in, over, or “from off” the shores of the area.⁵⁰ These earlier absolute prohibitions on the use of force in the Indochina area had not been lifted by the newer provisions in the War Powers Resolution. Secretary Kissinger, in a letter dated December 6, 1973, had reassured Senator Fulbright on this very point, stating: “It is our opinion that the War Powers Resolution does not supersede or otherwise modify those legislative restrictions.”⁵¹

Despite these congressionally imposed limitations, there were at once calls from Capitol Hill for an immediate military response by the President.⁵² Senator Clifford Case, Republican of New Jersey, a coauthor of the 1973 ban on American combat activity in Indochina, said the President would be justified in using force as a “police action” to retrieve the vessel.⁵³

The first presidentially decreed use of force occurred at 6:20 a.m. on the morning of May 13 and consisted of firing warning shots across the bow of the *Mayaguez* to prevent Cambodians moving the ship to the mainland.⁵⁴ At 1:00 a.m. on May 14, U.S. war planes sank three Cambodian gunboats which, according to the Department of State, were to have moved

⁴⁹ 22 U.S.C. §2151 (1970), as amended by Foreign Assistance Act of 1973, Pub. L. No. 93-189, §30, 87 Stat. 714.

⁵⁰ Department of Defense Appropriations Act for Fiscal Year 1975, Pub. L. No. 93-437, §839, 88 Stat. 1212 (1974); Department of Defense Appropriations Act for Fiscal Year 1974, Pub. L. No. 93-238, §741, 87 Stat. 1026; Department of Defense Appropriation Authorization Act for Fiscal Year 1974, Pub. L. No. 93-155, §806, 87 Stat. 615 (1973); Department of State Appropriation Authorization Act of 1973, Pub. L. No. 93-126, §13, 87 Stat. 451; Joint Resolution of July 1, 1973, Pub. L. No. 93-52, §108, 87 Stat. 130; Second Supplemental Appropriations Act, Pub. L. No. 93-52, §307, 87 Stat. 129 (1973).

⁵¹ The exchange between Senator Fulbright and Secretary Kissinger is cited in 1973 *DIGEST*, *supra* note 1, at 562-63. See also Dept. State Press Release No. 442, Dec. 6, 1973, at 21.

⁵³ *Id.* 19.

⁵² N.Y. Times, May 13, 1975, at 1.

⁵⁴ *Id.* May 16, 1975, at 15.

the U.S. crew to the mainland. Later on the morning of the 14th, the destroyer escort *Holt* reached the scene and at 5:14 p.m. of the same day the order was given for assault forces to begin to move out for the occupation of Kho Tang Island where the Marines were believed to be held. That occupation began at 7:20 p.m. and was followed some three hours later by extensive bombing of Ream airfield on the Cambodian mainland. Yet it was only at 6:40 p.m., half an hour before the Kho Tang landings, that President Ford began his first of a series of meetings with the congressional leadership in the Cabinet Room.

The crew was returned unharmed on the morning of May 15. Within a few days, in more than 13,000 letters, telegrams, and telephone calls, the American public indicated overwhelming approval of the President's handling of the incident.⁵⁵ Later, when it was learned that at least 15 Marines had been killed on Kho Tang and another 23 in a *Mayaguez*-related helicopter crash⁵⁶ in Thailand, a few questions began to arise. For the lawyer, those questions do not depend upon the logistic success or failure of the operation. Legally, it was a failure. The President adhered, at most, only to the reporting requirement (Sec. 4) of the War Powers Resolution. Even at that, he could be said to have reported to Congress within the mandatory 48-hour period only if the clock began to run after the actual use of force had started, rather than with the dispatch on the afternoon of May 12 of 1100 Marines from Okinawa and the Philippines to Utapao Air Base in Thailand. The report was received on Capitol Hill on May 15, after the completion of the operation. It stated that the President had acted "[i]n accordance with my desire that the Congress be informed on this matter and taking note of Section 4(a)(1) of the War Powers Resolution. . . ."⁵⁷ That resolution, however, did not merely require notification within 48 hours but also that "the President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities . . ." (Sec. 3). This provision, too, it is quite clear, President Ford ignored in the instance of the *Mayaguez*. Yet, unlike the three preceding cases, the *Mayaguez* operation clearly involved the dispatch of U.S. forces into intended hostilities.

The lack of consultation makes a useful case study and underscores once more the need to revise the statutory requirements. It was nearly 7:00 on Tuesday evening, May 13, when William T. Kendall, a congressional liaison officer for the White House, began to telephone more than a dozen leaders in the Senate and House to inform them of the situation. These perfunctory calls, made over no more than an hour and a half, by all accounts amounted to a notification of the action rather than a consultation.

⁵⁵ *Id.* May 17, 1975, at 10.

⁵⁶ Glennon cites the Congressional Research Service for the figure of forty-one members of the armed forces killed. Glennon, *supra* note 1, at 21 n.74.

⁵⁷ Report Dated May 15, 1975, From President Gerald R. Ford to Hon. Carl Albert, Speaker of the House of Representatives, in Compliance With Section 4(a)(1) of the War Powers Resolution. *Hearings, War Powers: A Test of Compliance*, *supra* note 39, at 76.

Nor were they "prior" to hostilities, since the first shots were fired by U.S. forces more than twelve hours earlier, on Tuesday morning. "I was not consulted," Senate Majority Leader Mike Mansfield said. "I was notified after the fact about what the Administration had already decided to do."⁵⁸ Kendall reported that "he had been given a prepared statement to read to the Senators on what amounted to a *fait accompli*."⁵⁹ He added: "If anyone had said, I think this action is inadvisable, I would have written that down and put it in my memo and it would have been seen by the President"⁶⁰ but that none of the leaders had objected to the military action. According to the White House staff member, about half the Senators called had voiced approval of the President's action while the other half simply acknowledged the information.⁶¹

Some congressional criticism was leveled at lack of consultation, but it was muted by the difficulty of cavilling at what appeared to be a palpable success. Congressman Morris K. Udall, a longtime opponent of the Vietnam and Cambodian wars, felt "compelled to state . . . support for the limited military action taken by President Ford."⁶² Senator Robert C. Byrd of West Virginia, the Senate Democratic Whip, did express concern over "the failure to ask at least some of the leaders to participate in the decision-making process" even though he too generously acknowledged that the President was not required to take such action.⁶³ Senator James O. Eastland, the President Pro Tempore of the Senate, and Senator Clifford Case, the ranking Republican on the Senate Foreign Relations Committee, also said publicly that they had not been consulted but had been informed. Senator Eastland reported being informed only after the launching of the attack. Both Eastland and Case nevertheless strongly supported President Ford's action.⁶⁴ Senator Thomas F. Eagleton of Missouri, who had been one of the principal authors of the War Powers Resolution, said that the resolution required the President to consult with members of Congress before launching an attack, if possible, and "at least hear out their advice."⁶⁵ Representative John B. Anderson of Illinois, the third ranking Republican in the House, expressed disappointment that Mr. Ford had done no more than to call up and say "'here's what we've decided.' That doesn't really fit the new era of divided responsibility."⁶⁶

Defending the process of consultation in the *Mayaguez* case, Monroe Leigh, the Legal Adviser, argued that:

First, the congressional leadership was informed of the principal military operations prior to the actual commencement of those operations; second, the congressional leadership did have an opportunity to express its view concerning the impending military operations—and in fact . . . many of them did express their views—and third, all views which were expressed by the congressional leadership either in the Cabinet room meeting on May 14 or in the two earlier telephone

⁵⁸ N.Y. Times, May 16, 1975, at 15.

⁶⁰ *Id.*

⁶² *Id.*

⁶⁴ *Id.* 18.

⁶⁶ *Id.*

⁵⁹ *Id.*

⁶¹ *Id.*, May 15, 1975, at 18.

⁶³ *Id.* 1.

⁶⁵ *Id.*, May 16, 1975, at 15.

contacts with the White House staff on May 13 and 14 were communicated directly to the President.⁶⁷

Even Leigh, however, observed that the White House was scarcely intent on an open exploration of its decision to intervene. On the contrary, the "President was extremely apprehensive that there be no breach of security in advance of the time that they [the troops] actually were landed, so there were strong arguments for not revealing that information—even to a select group of members—very much in advance of the time it was to occur."⁶⁸

These four cases indicate that the presidential tendency has been to report too late and to consult not at all.

A possible fifth case involved the use of U.S. forces to evacuate nationals from civil war-torn Lebanon in 1976. Although President Ford has subsequently cited the Lebanon evacuation as a prime instance of difficulties encountered in finding key Members of Congress in time to permit consultation under circumstances of urgency,⁶⁹ it is significant and disturbing that he did not even consider that particular use of force worthy of any report to Congress as required under Section 4(a) of the resolution.

The five cases testing the consultation and reporting procedures set out in Sections 3 and 4 of the War Powers Resolution simply repeat the historic process by which Presidents, precedent-by-precedent, interpret the requirements of the law so as to grind down its cutting edges. To correct this reversionary tendency, Senator Eagleton in 1975 introduced S. 1790, a new bill to amend and improve the War Powers Resolution. It would strike out the words "consult with Congress" as a requirement imposed on the President prior to the commitment of U.S. forces and would substitute the words "seek the advice and counsel of the Congress." These words are defined to mean that "before taking any steps which would firmly commit United States Armed Forces to hostilities" the President "shall in every possible instance discuss fully the proposed decision for his using such Armed Forces with Members of Congress, including but not limited to the majority and minority leaders of the Senate and the House of Representatives, the chairmen of the Armed Services and Foreign Relations Committees of the Senate and the chairmen of the Armed Services and International Relations Committees of the House of Representatives and shall fully consider their advice and counsel before committing the United States Armed Forces to any such proposed decision."⁷⁰ It would solve some, but by no means all, of the problems encountered to date.

But must the President consult as a matter of constitutional requisition? No definite answer leaps out from the black letter law. In each of the instances to date in which the consultative process has been put to the test of practice, the President was engaged in the rescue of U.S. citizens (and, in four instances, of some others) endangered abroad. If the President

⁶⁷ *Hearings, War Powers: A Test of Compliance*, *supra* note 39, at 77-78.

⁶⁸ *Id.* 81.

⁶⁹ *Ford Scores Limit on War Power*, N.Y. Times, April 12, 1977, at 14.

⁷⁰ S. 1790, 94th Cong., 1st Sess., 121 CONG. REC. 8829 (1975). In the House, a similar measure has been sponsored by Representative Seiberling. H.R. 7594, 94th Cong., 1st Sess., 121 CONG. REC. 4921 (1975).

is acting solely within his prerogative powers as Commander in Chief, which may have been the case at least in the instance of the *Mayaguez* rescue, can Congress oblige him to "consult" in the exercise of those powers? Both common sense and practice would indicate an affirmative answer. In Professor Sofaer's view, "the President was to act independently in conducting military operations, to insure effectiveness. But Congress could withdraw the means for any such operation . . . even to the point of totally depriving the President of the means for exercising his functions."⁷¹ It would seem compelled by good sense, then, that Congress could avoid so drastic a confrontation by providing for consultation, regardless of whether the President is in every instance constitutionally obliged to accept the invitation. The law in this respect would appear to be of a species with that pertaining to congressional requests for information "necessary and proper" to its functions.

V.

THE EFFECT OF WAR POWERS RESOLUTION ON "INHERENT" PRESIDENTIAL POWERS: THE PRESIDENTIAL PERSPECTIVE

To whatever extent the President has made an effort to comply with aspects of the War Powers Resolution, he has also taken care to disabuse Congress of any notion that he was carrying out a legal obligation. Instead, he noted that, in reporting or consulting, he had been acting "pursuant to the President's constitutional executive power and his authority as Commander-in-Chief" and as "Chief Executive in the conduct of foreign relations. . . ."⁷² In other words, presidential conduct in each instance was based not on acceptance of the War Powers Resolution but on an assertion of the inherent powers of the Presidency under the Constitution. It follows that such reporting and consultation as occurred was deemed *ex gratia* only—an act of accommodation with Congress motivated by political sensitivity rather than acceptance of the right of Congress to intervene in the exercise of these inherent presidential powers. While the distinction may seem academic, it is of capital importance in the context of the as yet untested, but potentially crucial, Section 5 of the resolution.⁷³ If the President is acting within his prerogative executive powers in bombing and invading Cambodia to rescue the *Mayaguez*, or in using the Marines to bring 5,000 pro-American South Vietnamese out of Saigon, then it could follow that Congress cannot, by legislation, regulate, interfere with, or terminate such an operation, either automatically at the end of

⁷¹ SOFAER, *supra* note 11, at 58.

⁷² Letters to Carl Albert of April 4, April 12, April 30, and May 15, 1975, in *Hearings, War Powers: A Test of Compliance*, *supra* note 39, at 4, 5, 7, 76.

⁷³ Section 1544(b) provides that within 60 days after a report is submitted or required to be submitted under §1543(a)(1), the President shall terminate the use of the armed forces unless Congress has declared war or authorized continuation of hostilities or is unable to meet. Section 1544(c) permits Congress to terminate any presidential use of force, in the absence of a declaration of war or legislative authorization, by concurrent resolution (congressional veto).

60/90 days or, earlier, by concurrent resolution. It could only terminate funding, exercising its constitutionally unlimited power of the purse, and hope the President would take such a cutoff more seriously than he did in the *Mayaguez* case.⁷⁴

Section 5, however, deals not in funding cutoffs but in legislative prohibition. Thus it matters whether a particular use of force falls within the congressional war power or the President's power as Commander in Chief. In his four reports to Congress, President Ford carefully protected his option, in future cases, to disregard Section 5 as an unconstitutional invasion of his executive powers. That stance was reenforced by his staff. Thus after *Mayaguez*, Presidential Assistant Roderick Hills took the position that "Mr. Ford had acted under his constitutional war powers to protect the lives and property of Americans."⁷⁵ Hills argued:

We should not assume that Congress would lightly interfere with the true constitutional war powers of the President—and what could be more at the heart of the true power than assuring the free passage of vessels in international waters and the safety of American citizens?

Congress has the power of the purse. But if it gives the President armies to command, and the duty, he must exercise it.⁷⁶

White House Press Secretary Ron Nessen added that the President has authority to protect the lives of Americans and the property of Americans under the Constitution.⁷⁷

It is possible to speculate as to what might have happened if Congress, instead of acquiescing supinely, had invoked the War Powers Resolution to order the termination of one of these four operations. Indeed, as already noted, the Foreign Assistance Act had specifically prohibited the use of funds for "military or paramilitary operations by the United States in or over Vietnam, Laos or Cambodia."⁷⁸ Efforts in Congress to enact a specific approval of the emergency evacuation having failed to pass by the time the President acted, all four operations were still barred by this

⁷⁴ The power of the purse extends congressional jurisdiction to all subjects for which funding is required, regardless of whether the matter is otherwise within congressional or presidential discretion. The Legal Adviser has also conceded that any military action by the President could be terminated by congressional refusal of funds once the previous appropriation had run out. Mr. Leigh, in answer to Congressman Solarz' question on this point replied: "If he [the President] has used up all the money appropriated and then Congress refuses to provide any more, I think the Congress has effectively stopped the President from continuing the military action." *Hearings, War Powers: A Test of Compliance*, *supra* note 39, at 92. For an elaboration of the distinction between the power of Congress to authorize expenditure of funds and appropriate monies on the one hand, and its power to legislate on the other, see Glennon, *supra* note 1, espec. 21-23, 32-38.

⁷⁵ N.Y. Times, May 15, 1975, at 18.

⁷⁶ *Id.* May 18, 1975, §4, at 2.

⁷⁷ *Id.* May 15, 1975, at 18. In this assertion of executive prerogative, the White House may have been inadvertently supported on the evening of May 14, at the height of *Mayaguez* fever, by a resolution of the Senate Foreign Relations Committee. Although not voted by the full Senate, the resolution was approved unanimously by the Committee. It said in part: "We support the President in the exercise of his constitutional powers within the framework of the War Powers Resolution to secure the release of the ship and its men." *Id.*

⁷⁸ Act of Dec. 17, 1973. Pub. L. No. 93-189, 87 Stat. 714.

prohibition, a fact not unnoticed by the Administration which had come to Congress to request the authorization in what must be assumed to be a belief that it was needed. In reply to subsequent congressional cross-examination on the point, the Legal Adviser of the Department of State argued: (1) that the 1973 law meant to terminate U.S. involvement in the war but did not intend to cut off funding for humanitarian rescue operations and (2) that, in any event, the President has inherent constitutional authority to rescue American nationals endangered abroad, as well as nonnationals if that action is operationally linked to the rescue of the Americans.⁷⁹ It would appear to follow from the second proposition that, if the President's inherent powers of rescue are perceived by the White House to override a specific statutory prohibition signed into law by the President, those inherent powers must ipso facto override a "mere" concurrent resolution passed by the two Houses under Section 5(b) of the War Powers Resolution.⁸⁰

Asked by Congressman Solarz to specify situations in which the President has inherent constitutional authority to introduce armed forces into hostilities, the Legal Adviser wrote:

Besides the three situations listed in subsection 2(c) of the War Powers Resolution, it appears that the President has the constitutional authority to use the Armed Forces to rescue American citizens abroad, to rescue foreign nationals where such action directly facilitates the rescue of U.S. citizens abroad, to protect U.S. Embassies and Legations abroad, to suppress civil insurrection, to implement and administer the terms of an armistice or cease-fire designed to terminate hostilities involving the United States, and to carry out the terms of security commitments contained in treaties. We do not, however, believe that any such list can be a complete one, just as we do not believe that any single definitional statement can clearly encompass every conceivable situation in which the President's Commander in Chief authority could be exercised.⁸¹

Such a view, if correct, would render nugatory the congressional role under the War Powers Act, for it removes from the purview of Congress and of Section 5 virtually every situation which has given rise to presidential wars in the era since World War II. The Vietnamese and Korean operations were allegedly undertaken in pursuance of security commitments contained in treaties, the Dominican invasion was intended to rescue American citizens abroad and to protect the U.S. Embassy, and President Eisenhower's Lebanese intervention occurred in response to civil insurrection. It would be a President of impoverished imagination who could not fit every conceivable military contingency into one of these elastic categories.⁸² The conduct and legal rhetoric of the Ford Administra-

⁷⁹ *Hearings, War Powers: A Test of Compliance*, *supra* note 39, at 88.

⁸⁰ Even more far reaching is the implied assertion that Congress cannot refuse funds for an exercise of inherent presidential power, a proposition for which there is no support whatever in the Constitution or in historical sources. For discussion, see Glennon, *supra* note 1, at 28-38.

⁸¹ *Hearings, War Powers: A Test of Compliance*, *supra* note 39, at 90-91.

⁸² At the same time, at least some of these inherent executive powers have been asserted by Presidents almost from the beginning. Jefferson (who had been elected to

tion in its first four encounters with the War Powers Resolution does not encourage the view that the Presidency has receded from any significant assertions of power to use force for the redress of alleged wrongs incurred or to relieve distress experienced by the United States, its flag, citizens, or property, at home, on the seas, or in foreign lands. Nor has the Executive relinquished its right to succor non-Americans, to intervene to end civil conflict abroad, or to determine the extent of U.S. obligations to defend foreign states under the terms of security treaties. If so, the Executive will continue to assert that, so long as funds are available, the President may undertake such military initiatives regardless of what Congress purports to do under Section 5 of the resolution.

Indeed, President Ford has chosen to pursue a campaign against the War Powers Resolution into his retirement. At the University of Kentucky on April 11, 1977, he urged its reexamination by Congress, arguing that the requirement for consultation could cause costly delays in responding to a crisis. "When a crisis breaks," he said, "it is impossible to draw the Congress into the decision-making process in an effective way" because lawmakers, especially during recesses, are often hard to locate quickly enough and because, even if they are in Washington and available for consultation, they cannot be as well versed as the President in fast-breaking developments. He also noted the risk that sensitive information will be disclosed. He concluded that "there is absolutely no way American foreign policy can be conducted or military operations commanded by 535 members of Congress even if they all happen to be on Capitol Hill when they are needed."⁸³

The problems to which the former President alludes are genuine ones. However, the issue is surely overstated. The requirement to "consult with Congress" is not to be interpreted to mean that the President must personally talk with 535 members and the requirement is specifically modified by the phrase "in every possible instance." Conceivably, however, the

implement Republican designs for reduction in presidential power as well as a restoration of congressional and, particularly, states' rights) authorized extensive offensive military action by the 1801 expedition of Commodore Dale against the Barbary Powers—Algiers, Tunis, and Tripoli—without congressional authorization. The President sent the naval expedition to the Mediterranean armed with Secretary Gallatin's assurance that the President could make war after it had been authorized "either by the decree of Congress or of the other nation. . . ." The naval expedition was instructed that if it encountered hostilities from the Barbary fleet it was to "chastise their insolence—by sinking, burning or destroying their ships and vessels wherever you shall find them." Secretary of the Navy Smith justified sending the expedition by citing a congressional law "providing for a Naval Peace Establishment" and by quoting the President to the effect that "one great object of the present squadron is to instruct our young officers. . . ." Yet Jefferson, in sending the expedition, must have known that it was likely to become engaged in hostilities and that these, in turn, would be used to justify a protracted undeclared war. In support of this and other actions unsupported by congressional fiat, Jefferson evolved "a doctrine of emergency power that relegated the legislature to the exercise of extreme after-the-fact remedies in all national crises." That doctrine, much embellished, remains very much alive. SOFAER, *supra* note 11, at 209–10, 227.

⁸³ N.Y. Times, April 12, 1977, at 14.

consultation requirement should be limited by an amendment such as the one proposed by Senator Eagleton and Representative Seiberling or one stipulating a somewhat broader constituency for consultation consisting of two designated members each of the Senate and House Committees dealing with foreign affairs, armed services, and intelligence, and the foreign affairs appropriations subcommittees, as well as the two senior leaders of both parties in both Houses. These members would have to undertake to be permanently on call, either in person or by electronic communications, much like the members of the Senate Select Committee on Intelligence which currently has a comparable consultative role in respect of proposed covert operations.⁸⁴ The disadvantage of such a scheme of elite consultation, from the Administration's point of view, is that, in the currently less hierarchical Congress, these "elders" could not guarantee the support of the rank-and-file for an operation to which they gave their approval. However, while no system of shared authority can be without difficulties, it is virtually beyond debate that some form of consultation is both legally and politically necessary and that effective consultation requires establishment of a designated group of manageable size and with expeditious procedures.

President Carter appears to have recognized the need for effective consultation and may even have endorsed the restrictive view of inherent powers implied by Section 5. In reply to a telephone inquiry, he said that the War Powers Resolution is "a reduction obviously in the authority that the President has had prior to the Vietnam War, but I think it's an appropriate reduction." He added that he had "no hesitancy about communicating with Congress, consulting with them . . . before we start any combat operation."⁸⁵ If this is, indeed, the policy of the new President, he should have no objection to the strengthening of Sections 3, 4, and 5 so as to make them effective in the event the Union reverts to a less law-abiding presidency.

VI.

THE WAR POWERS RESOLUTION'S EFFECT ON INHERENT POWERS OF THE COMMANDER IN CHIEF: THE LEGISLATIVE PERSPECTIVE

The War Powers Resolution seems both to confirm and deny that the President has inherent warmaking powers conferred by the Constitution. Section 2(c) appears to come close to conceding that the Commander in Chief has inherent constitutional power to introduce armed forces into hostilities on his own authority in "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." From this concession—whatever its wisdom—it ought to follow that he has no inherent war powers in any other situations. The effectiveness of this limitation is undermined, however, in several significant ways. As noted above, the Conference Committee Explanatory Statement itself appears to disavow the intent to make Section 2(c) exhaustive or binding,

⁸⁴ Resolution to Establish a Standing Committee of the Senate on Intelligence and for Other Purposes, *supra* note 8.

⁸⁵ N.Y. Times, March 6, 1977, at 33.

as had been its counterpart in the Senate version of the bill.⁸³ This disarming of Section 2(c) was the result of a deliberate effort by the House conferees aided by a few senatorial counterparts to effect a compromise that would be less objectionable to the President. Moreover, the seriousness of Section 2(c) as an exhaustive enumeration of inherent presidential powers is further put in doubt by the failure to include the right to rescue U.S. citizens imperiled abroad. Implicitly, Section 2(c) is also undermined by Section 5(c) which gives Congress, without presidential assent, the power to terminate any hostilities, apparently not excluding those pursued under color of Section 2(c). The Legal Adviser of the Department of State has observed: "if the President had the power to put the men there in the first place that power could not be taken away by concurrent resolution because the power is constitutional in nature."⁸⁷ It does seem as if even the drafters of the provision authorizing congressional termination of hostilities were not anxious to endorse the enumeration of presidential war powers contained in Section 2(c). The resultant cloud of uncertainty surrounding the hapless Section 2(c) is scarcely lifted by the reassurance in Section 8(d)(1) that nothing in the resolution "is intended to alter the constitutional authority of the Congress or of the President. . . ."

The drafting of the War Powers Resolution thus leaves important ambiguities. It adopts a scheme which does not fit compatibly into the division of powers envisaged by the Constitution. That instrument appears to state, or, at least, has long been interpreted to mean, that Congress has the power to declare war in any circumstances but that the President has the power to use force without congressional authorization only in some limited instances. Disputes between champions of one or the other branch have centered on the *instances* in which the President may act alone. Instead, the resolution seems to propose a quite different division of powers between the branches. The President, without prior restraint, may initiate (some?) wars, but, whatever hostilities he commences, Congress may subsequently terminate. Thus, the approach to allocation of overlapping powers to engage in war is redirected from the enumeration of *instances* to the specification of *duration*. In effect, the President seems to be conceded the power, under incompletely delimited circumstances, to start

⁸³ WAR POWERS RES.: RELEVANT DOCS. *supra* note 32, at 13-14.

⁸⁷ *Hearings, War Powers: A Test of Compliance*, *supra* note 39, at 91.

The Legal Adviser, Mr. Leigh, was posed the following hypothetical by Representative Solarz: Suppose U.S. troops in Korea are attacked by North Korea just inside South Korea. Leaving aside any treaty commitments the United States might have with the Republic of Korea, suppose the President sent in reinforcements to defend those U.S. troops and then Congress passed a concurrent resolution under the War Powers Resolution telling the President to take the troops out.

Mr. Solarz: [y] our position, if I understand it, would be that since he had sent troops in to protect the troops that were originally fired on and that was done as a result of his implied authority as Commander in Chief, that he could safely disregard this concurrent resolution on the grounds that the Congress cannot take away a power which he has from a constitutional point of view.

Mr. Leigh: I hope that I am not going to be asked to rule on this. I believe the answer to that is yes. I am not speaking for the administration.

short wars and Congress the power to terminate long ones. Whatever the functional merits of such an allocation, it is not what the drafters of the Constitution had in mind. On the contrary, they included both Houses of Congress in the warmaking, but not the war-terminating, process because they believed that the former should be more encumbered by the widest possible deliberation than the latter.⁸⁸ The War Powers Resolution seems to reverse those priorities.

There are reasons to regret Congress' failure to use the vehicle of the War Powers Resolution to attempt a serious, exhaustive enumeration of instances in which the President may use force in international relations on his own constitutional authority. Such an enumeration, while not determinative, would carry considerable weight and be of significant assistance in any future judicial proceedings brought to determine the constitutionality of an undeclared war or its legal incidents. It would, at least, serve as evidence balancing the historical precedents, particularly those derived from the past fifty years of congressional acquiescence, that support the virtually unfettered warmaking power of the Commander in Chief.

More important, Congress has probably struck a bad bargain by conceding the President too free a hand in short wars while reenforcing its power to terminate long ones. The House and Senate have always had the means to stop undeclared wars by drawing the pursestrings. The War Powers Resolution does not greatly improve on that power, although subsequent termination is made procedurally easier by the mandatory 60/90-day cutoff and the congressional veto. Even so, in practice, termination of a military action by concurrent resolution of Congress—or even by deliberate inaction and operation of statute—would be an excruciating experience. Once U.S. forces and the national honor have been committed, Members are understandably reluctant to refuse the means necessary to bring the conflict to a successful conclusion. It is far less politically painful for Congress to prevent the beginning of a presidential war than to attempt to terminate it. The War Powers Resolution, however, weakens the congressional power to prevent military action by conceding, without effectively limiting or defining it, a presidential power to start wars while only marginally strengthening the power of Congress to terminate them.

VII.

THE CONGRESSIONAL VETO: CONSTITUTIONALITY IN THE WAR POWERS CONTEXT

The doubtful constitutionality of the concurrent resolution procedures in Section 5 of the War Powers Resolution further suggests that the gain in congressional power to terminate wars begun by the President is not significant.

⁸⁸ Oliver Ellsworth and George Mason were explicit in wanting to clog war and facilitate peace. "[T]here is a material difference," Ellsworth said, "between the cases of making *war* and making *peace*. It shd. be more easy to get out of war, then into it. War also is a simple and overt declaration. Peace attended with intricate & secret negociations." 2 FARRAND, *supra* note 14, at 318-19.

The "congressional veto" is a device by which Congress, or one House, seeks to make "law" without subjecting it to the prior approval of the President required by Article I, Section 7, the "presentation clause" of the Constitution. The "law" thus being made, however, is normally confined to the disapproval of some action taken by the Executive under authority delegated by Congress.

According to a recent study made for Congress, there are currently 295 separate provisions in 196 acts of Congress, all passed during the last 40 years, which provide for some type of congressional case-by-case review over, or consent for executive implementation of a delegated authority.⁸⁹ Twenty-two of these deal with foreign affairs.⁹⁰ The devices used by Congress for review, approval, or disapproval of executive actions run the gamut from directives commanding an agency to consult with or to "come into agreement with" congressional committees, to resolutions of approval or disapproval by appropriate committees or by one or both Houses of the Congress.

By no means do all of these review provisions entail congressional vetoes. But 34 legislative provisions permit both Houses, by concurrent resolution, and 53 allow either House, by simple resolution, during a prescribed period of time, to adopt resolutions of disapproval blocking proposed implementations by the executive branch. The principal and most controversial feature of these "one House" and "two House" vetoes is their claim that they do not constitute legislation and thus take effect free of the "presentation clause" requirement for presidential assent.⁹¹

⁸⁹ NORTON, CONGRESSIONAL REVIEW, DEFERRAL AND DISAPPROVAL OF EXECUTIVE ACTIONS: A SUMMARY AND AN INVENTORY OF STATUTORY AUTHORITY 1 (Congressional Research Service, Library of Congress, 1976).

⁹⁰ *Id.* 7.

⁹¹ The earliest instance of the incorporation of this device in legislation is to be found in the Legislative Appropriations for Fiscal Year 1933 (Pub. L. No. 72-212, §407, 47 Stat. 414 (1932)) which authorized the President to reorganize executive departments by orders which were to be laid before Congress. Either House, by resolution, could nullify such an order within 60 days. In the field of foreign relations, the first use of the device is in the 1947 authorization of aid to Greece and Turkey [Act of May 22, 1947, Pub. L. No. 80-75, ch. 81, §2153(d), 61 Stat. 103] which permitted assistance to be terminated by concurrent resolution of the two Houses. By a 1958 amendment to the Atomic Energy Act of 1954 (42 U.S.C. (1970), as amended by Act of July 2, 1958, Pub. L. No. 85-479, §4, 72 Stat. 276), certain agreements for cooperation with foreign nations to improve their atomic weapon capability were subject to a concurrent resolution veto during a 60 day lying-in-wait period.

By far the broadest assertion of congressional veto power is to be found in 22 U.S.C. §2367 (1970), as amended by the Foreign Assistance Act of 1961, Pub. L. No. 87-195, §17, 75 Stat. 424, which provides: "Assistance under any provision of this Act may, unless sooner terminated by the President, be terminated by concurrent resolution" and must end after an eight-months wind-up period. The most controversial use of the concurrent resolution provision came in the War Powers Resolution, controversial both because it touched on a crucial subject matter and because it raised more complex constitutional issues than hitherto. Thereafter, however, the congressional veto was written into other important foreign relations legislation including the Atomic Energy Act Amendments of 1974, 42 U.S.C. §2074 (Supp. V 1975), as amended by Atomic Energy Act Amendments of 1974, Pub. L. No. 93-377, §2, 88 Stat. 472; also 42 U.S.C.

It is difficult to be dogmatic about the constitutionality of the concurrent resolution procedure for at least four reasons: (1) the arguments are rather evenly balanced; (2) legality may vary depending on the legislative context; (3) use of the concurrent resolution procedure has been minimal in practice; and (4) the courts have not had occasion to rule definitively.

§2153(d) (Supp. V 1975), as amended by Atomic Energy Act Amendments of 1974, Pub. L. No. 93-377, §5, 88 Stat. 475, and Act of Oct. 26, 1974, Pub. L. No. 93-485, §1, 88 Stat. 1460. The 1974 Foreign Assistance Act required the President to lay before both Houses any proposed offer to sell defense articles for \$25 million or more and gave Congress 20 days to disapprove the sale by concurrent resolution. That disapproval, however, could be overridden by the President if he certified that an emergency existed which required the sale in the interest of national security (22 U.S.C., §2776(b) (Supp. V 1975), as amended by the Foreign Assistance Act of 1974, Pub. L. No. 93-559, §45(a) (5), 88 Stat. 1795 (1974); Foreign Military Sales Act, 22 U.S.C. §2201 (1970), as amended by Act of Oct. 22, 1968, Pub. L. No. 90-629, §36(b), 82 Stat. 1320). The same law also provided for two-House veto within 30 days after notification to Congress of each obligation or expenditure of authorized and appropriated funds for any country in the Middle East (*id.*, §42). A one-House veto of base construction on Diego Garcia was included in the Military Construction Authorization for 1975, Pub. L. No. 93-552, §613, 88 Stat. 1745 (1974). Congressional vetoes were also written into the Trade Act of 1974, Pub. L. No. 93-618, tit. II, III, IV, 88 Stat. 1978 (1975) (codified in scattered sections of 19 U.S.C.) and into the Export-Import Bank Act of 1945, §7(b), 12 U.S.C. §635(e) (Supp. V 1975), as amended by Export-Import Bank Amendments of 1974, Pub. L. No. 93-646, §4, 88 Stat. 2333 (1975), which required affirmative action by both Houses to approve loans or financial guarantees exceeding \$300 million in connection with exports to the USSR. In a 1976 Authorization Act, the operation of the Foreign Military Sales Act was further altered to remove the discretion left the President in the 1974 Foreign Assistance law. The new version permits Congress, by concurrent resolution, to prevent outright any sale of a defense article or service valued at \$25 million or more during a period of 20 days after the President notifies the legislators of an intent to sell (Board of International Broadcasting Authorization for Fiscal Year 1976, Pub. L. No. 94-104, §2(c)(4), 89 Stat. 509 (1975)).

The joint resolution by which Congress in 1975 authorized U.S. participation in the Sinai early warning system contains a caveat to the effect that Congress, by concurrent resolution, may withdraw American personnel if it determines that their safety is in jeopardy or that their role has become redundant (Resolution to Implement the United States Proposal for the Early Warning System in Sinai, Pub. L. No. 94-110, §1, 89 Stat. 572 (1975)). In the same year, as part of a mandatory reorientation of the food-for-peace program in favor of the neediest—as distinguished from those most closely allied to the United States—Congress gave itself the power to disallow, by concurrent resolution, allocations in excess of 25 percent of total food aid to countries with a per capita income of more than \$300, even after the President certifies that humanitarian needs required otherwise (7 U.S.C. §1711 (Supp. V 1975)), as amended by the International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, §207, 89 Stat. 853). The same Act also prohibits aid given by way of food, or for development of technology, education, research, health, and population planning, to any country “which engages in a consistent pattern of gross violations of internationally recognized human rights,” unless the Agency for International Development, at the request of the appropriate Committees of Congress, demonstrates that “such assistance will directly benefit the needy people” of such country. If Congress disagrees, aid may nevertheless be terminated by concurrent resolution (Foreign Assistance Act of 1961, 22 U.S.C. §2151n (Supp. V 1975), as amended by International Development and Food Assistance Act, Pub. L. No. 94-161, §310, 89 Stat. 860 (1975)).

The defense of constitutionality turns in part on the fact that such provisions, at least since 1932, have become a recurrent part of legislation—a line of argument rebutted, in the obverse context, by frequent assertions by Congress that even the most persistent pattern of encroachments on constitutional powers cannot alter the Constitution.⁹² Nevertheless, the Congressional Reference Service asserts that the “legislative history suggests [that] the constitutionality of the . . . legislative veto . . . is virtually universally accepted.”⁹³

It is also argued that concurrent resolution provisions are mere conditions subsequent to a delegation of legislative power: that a law, to which, moreover, the President freely assented when he signed the legislation in which it is found, gives the Executive no more than a limited power in prescribed circumstances, *i.e.*, in the event that Congress does not exercise its option to pass a concurrent resolution in disagreement. This follows from the proposition of logic that the lesser is contained in the larger, that the power to authorize an exercise of discretion by the Executive perforce includes the power to delimit the conditions in which it may be exercised.⁹⁴ These arguments, however, are inapplicable to the War Powers Act. In respect of at least some instances of presidential use of force, the executive discretion being subjected to the legislative veto may be granted the President

In 1976, Congress made a concerted effort to amend Sec. 502(B) which had been added in 1974 to the Foreign Assistance Act (International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, §301(a), 90 Stat. 761, amending Foreign Assistance Act of 1961, 22 U.S.C. 2304 (Supp. V 1975), as amended by Foreign Assistance Act of 1974, Pub. L. No. 93-559, §46, 88 Stat. 1795). The intent was to replace the 1974 “sense of Congress” opposing export of arms to states with a record of “consistent pattern of gross violations of internationally recognized human rights” with a prohibition enforceable on a country-by-country basis by a two-House veto. This was, itself, vetoed by the White House with a broadside at “Congressional encroachment on the Executive Branch’s constitutional authority to implement [foreign] policy.” 12 WEEKLY COMP. OF PRES. DOCS. 828 (May 7, 1976). See Sec. 101 to Amend Sec. 502(B) of the Foreign Assistance Act of 1961 in H.R. 11963 and S. 2662 as it emerged from Conference. H.R. REP. No. 1013, 94th Cong., 2d Sess. (1976), Conference Report on International Security Assistance and Arms Export Control Act of 1976. The version which ultimately became law deleted the concurrent resolution provision. Nevertheless, the same legislation broadened the congressional veto power over arms exports to include country transactions involving “any major defense equipment for \$7,000,000 or more” and permitting 30 days for its exercise after the President has reported on the proposed sale (22 U.S.C. §2776 (Supp. V 1975), as amended by International Security Assistance and Arms Export Control Act of 1976, *supra* §211(a)).

⁹² “Even 200 years cannot make constitutional what the Constitution declares is unconstitutional.” Senator Sam Ervin in the context of a discussion of the Executive’s practice of circumventing the Constitution’s treaty clause by recourse to the executive agreement. *Hearings on S. 3475 before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92nd Cong., 2d Sess., 4 (1975).

⁹³ Library of Congress, Congressional Research Service, Memo: “Constitutionality of the Legislative Veto Amendment to the Foreign Military Sales and Assistance Act,” for Hon. Gaylord Nelson, Sept. 4, 1973, at 13.

⁹⁴ This argument is also made in H.R. REP. No. 120, 76th Cong., 1st Sess. 4-6 (1939).

by the Constitution, not by legislative delegation from Congress. Moreover, the Act having been passed over presidential veto, the estoppel argument, weak in any event, is wholly inapplicable.

In the first instance, the constitutionality of the congressional veto under the War Powers Resolution probably depends upon whether the power being exercised by the President which Congress seeks to repel by concurrent resolution is inherently presidential or congressional. Such a distinction between what is, and what is not, congressionally vetoable has been recognized by early proponents of the device.⁹⁵

The uncertainty about congressional vetoes is buttressed by reluctance to make use of the device once it is on the books. According to a recent study, "with the exception of impoundment control, the hundreds of congressional veto provisions have not induced wholesale interventions by Congress in the conduct of administration."⁹⁶ Between 1960 and 1975, 351 "veto" resolutions were introduced, more than 100 of them duplicates and only 63 became effective. Most generated "no legislative action whatsoever, not even the introduction of a resolution."⁹⁷ This sanguine view is challenged, however, by the finding that fully two-thirds of the veto resolutions introduced were adopted in 1975, the last year of the study—a fact to be dismissed as indicative of Republican presidential vulnerability after Vietnam and Watergate in relation to the Democratic Congress or to be regarded as a serious harbinger of a new, but not necessarily transitory, congressional activism.

The study does not disclose any instances of the actual passage of a concurrent resolution to terminate a foreign relations initiative by the President. The device in the War Powers Act has lain dormant. However, in at least one instance—the crisis over the sale of fourteen Hawk Missile batteries to Jordan in 1975—the Congress informally demonstrated that it had the power and will to pass the resolution necessary to bar that sale. As a result, the Executive backed down and agreed to a modification of key specifications and conditions.⁹⁸ Despite its disuse, the congressional veto has undoubtedly had a "chilling effect" on the exercise of executive discretion, even in the foreign relations field.

On two recent occasions the federal judiciary was strongly urged to determine, once and for all, the constitutionality of a concurrent resolution

⁹⁵ This distinction appears to have been implied by the Attorney General in 1949, in arguing in favor of the constitutionality of the congressional veto in the Reorganization Acts of 1939 and 1945. The opinion speaks of "consultation" as a required prerequisite for the exercise of authority delegated by Congress but notes that the President frequently consults also "on matters which may be considered to be strictly within the purview of the Executive, such as those relating to foreign policy." Memorandum Re: Constitutionality of Provisions in Proposed Reorganization Bills Now Pending in Congress, reprinted in S. REP. No. 232, 81st Cong., 1st Sess. 18–20 (1949).

⁹⁶ Schick *Congress and the "Details" of Administration*, 36 PUBLIC ADMINISTRATION REV. 516, 523 (1976).

⁹⁷ *Id.*

⁹⁸ The concurrent resolutions in respect of the Hawk sale were introduced under the terms of the 1974 Nelson-Bingham amendment to the 1961 Foreign Assistance Act, Pub. L. No. 90-629, §36(b), 82 Stat. 1320.



device. In each instance, the court declined. Both cases arose in the context not of a law pertaining to the foreign relations power but of the Federal Election Campaign Act.⁹⁹ In *Buckley v. Valeo*¹⁰⁰ the Supreme Court was able to avoid a decision on the constitutionality of one-House vetoes twice invoked against regulations made by the Federal Electoral Commission by instead holding unconstitutional the legislative scheme by which the Commission was appointed.¹⁰¹ One year later, in *Clark v. Valeo*¹⁰² the Court of Appeals of the District of Columbia on hearing *en banc* said in a *per curiam* opinion: "whether legislative review of regulations constitutes legislation to which the presidential veto necessarily applies . . . need not be reached in these proceedings because of the unripeness of a challenge based upon the veto power."¹⁰³ The adoption of a veto resolution had not yet occurred under the revised legislation.¹⁰⁴ Although it was argued that the "one-house veto is so patently unconstitutional that nothing more is needed to inform the judgement of the court," the Court refused to decide.¹⁰⁵ In so doing, Judge Tamm noted that Justice White, in a concurring opinion in *Buckley v. Valeo*, "had found the provision *constitutional* on its face."¹⁰⁶ The majority did not adopt this view, but neither did they reject it,¹⁰⁷ maintaining that a court, before making a ruling on an issue which has been the subject of controversy for forty years, should know a great deal more about what a specific congressional veto means in practice and how it affects the operation of that part of the government at which it is aimed. Only on a fuller record, they said, can a court make the "landmark" determination whether the device "is really a violation of, or perhaps might be a furtherance of, the objective of pragmatic government that combines checks and balances with the principle of coordination between branches."¹⁰⁸

It is significant that the test arose in an area of domestic legislative jurisdiction. The Court hinted at the importance of this in distinguishing the government's claim of standing based on *New York Times Co. v. United States*.¹⁰⁹ It said: "The Constitution does not give the President any duty to protect the Constitution from allegedly unconstitutional legislation *comparable to his self-executing mandate to conduct foreign affairs*."¹¹⁰ (Italics added) It should be noted, however, that these perhaps rather

⁹⁹ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 20, 47 U.S.C. (Supp. V 1975)), as amended by Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

¹⁰⁰ *Buckley v. Valeo*, 424 U.S. 1 (1976). ¹⁰¹ *Id.* at 140, n. 176.

¹⁰² No. 76-1825 (D.C. Cir. Jan. 21, 1977) (*per curiam*).

¹⁰³ *Id.* slip op. at 12.

¹⁰⁴ *Id.* slip op. at 15.

¹⁰⁵ *Id.* slip op. at 15, n. 8.

¹⁰⁶ *Id.* citing *Buckley v. Valeo*, *supra* note 100, at 284-86.

¹⁰⁷ "Be that as it may," Judge Tamm said of Mr. Justice White's view. *Clark v. Valeo*, *supra* note 102, at 15, n. 8.

¹⁰⁸ *Id.* at 17.

¹⁰⁹ 403 U.S. 713 (1971).

¹¹⁰ *Clark v. Valeo*, *supra* note 102, at 3, concurring opinion of Tamm, J., Bazelon, C. J., and Wright, J.

unwittingly expansive echoes of *Curtiss-Wright*,¹¹¹ besides being *dicta*, were not addressed to the exercise of the congressional veto but to the question of standing.

In another concurring opinion, Judge Leventhal speculatively advanced a distinction which, while theoretical, may also be the practical approach of the future. "One's view of the one-house veto issue may be affected," he said, "for example, if it should develop that Congress itself distinguished between regulations that are 'interpretative,' and therefore more aligned with the responsibility of the executive branch, and regulations which are 'legislative,' that implement or carry forward a statutory mandate in ways not specified by the statute, and with respect to which a more substantial congressional role might be proper."¹¹² By this test, a congressional veto of a military operation initiated by the President would almost certainly be invalid.¹¹³ In this view, the constitutionality of the congressional veto depends upon whether the Congress, in a given instance, is helping the Executive in the exercise of a delegated rule-making power (*viz.* by approving or rejecting a proposed general scheme of regulation or reorganization) or is using its reserved power of approval or disapproval as a device to interfere in the case-by-case application of standards set by law. The latter function is the proper province of the Executive, which is constitutionally charged with responsibility to ensure that the laws are faithfully executed, and, if an umpire is needed, then of the judiciary.

Putting it another way, Congress may indicate the limits it wishes to place on the exercise by the President of war-making powers. But it cannot, except by the extraordinary remedy of denying funds, limit those aspects of the power that inhere in the Commander in Chief. Neither can it use the congressional veto to remove from the province of the courts the question of *ultra vires* regarding presidential exercise of an authority specifically delegated by Congress. It can enact laws that limit or sharply define the exercise of a delegated power, but Congress cannot sit behind the President and countermand his orders whenever a majority in Congress disagree with the way the laws are being executed. If this analysis is correct, Congress will have to rely, in any future conflict over executive war-making, either on its ordinary power of the purse or on the courts' declaring a presidential use of force to be *ultra vires* his inherent or delegated authority, and not on the congressional veto.

Tactically, reliance on the courts has much to be said for it. We have

¹¹¹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹¹² *Clark v. Valeo* *supra* note 102, at 4, concurring opinion of Leventhal, J.

¹¹³ The case also generated one dissent, by MacKinnon, J., which addresses itself specifically to the unconstitutionality of the one-House veto, asserting that it "greatly increases the authority of a small *minority* of the entire Congress to achieve a legislative result, when compared with the constitutionally prescribed legislative procedure." (*Id.* at 7, dissenting opinion of MacKinnon, J.) Thus a small number of members of Congress, a bare majority of the quorum, can unmake regulations made by the executive branch without recourse to legislative enactment. "That naked intrusion violates the basic three branch constitutional scheme for our Government and the legislative scheme provided by art. I, sections 1, 7 of the Constitution." (*Id.* at 9.)

noted the relative impunity with which President Ford was able, during the *Mayaguez* crisis, to ignore a congressional funding cutoff. President Truman, on the other hand, was unable to ignore the Supreme Court's refusal to allow the exigencies of the Korean war to legitimate the steel seizures.¹¹⁴ If Congress wants to limit presidential power in circumstances when the public is rallying behind the flag, it will probably need the help of the Supreme Court. And the Supreme Court will need the help of boundaries established by the Constitution and adumbrated by legislation. All the more reason to spell out these boundaries as carefully as possible. The present War Powers legislation is not particularly satisfactory in that respect, precisely because it relies so much on the ad hoc device of the congressional veto.

Again, it may be argued that reform has become unnecessary. On two occasions, the Carter Administration has stated its belief that the War Powers Resolution as a whole is constitutional. In one instance, in the confirmation hearings of Secretary of State Vance, Senator Javits asked: "Do you challenge [the War Powers Resolution] under the Constitution as to the President's power?" Vance answered, "No."¹¹⁵

On the second occasion, noted earlier in this article, President Carter endorsed the War Powers Resolution, in a reply to a telephone caller, as "an appropriate reduction" in presidential power.¹¹⁶ In both instances, however, the reply was made in response to a question focusing on only a part of the resolution. In the Senate hearings, Senator Javits' question was prefaced by quoting only Section 3, the consultation requirement. In the telephone conversation, the caller referred only to the need for congressional approval of warmaking after expiration of 60 days, not to the congressional veto. It would be premature to conclude that this, let alone future, administrations will deem themselves bound by two spontaneous, unplanned utterances. A broad hint to this effect is contained in the new Attorney General's defense of a one-House veto provision in the executive reorganization statute.¹¹⁷ "This power to take no action with respect to reorganization plans should be carefully distinguished," Mr. Bell wrote, "from the situation created by statutes which provide for subsequent resolutions disapproving presidential actions in the administration of continuing programs. . . . Such statutes frustrate the constitutional check of the presidential veto in violation of Article I and infringe on the doctrine of separation of powers."¹¹⁸

VIII.

TREATY COMMITMENTS

The War Powers Resolution created some serious doubts about the status of U.S. mutual security commitments.¹¹⁹ Section 8(a)(2) provides

¹¹⁴ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹¹⁵ *Vance Nomination: Hearings before the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess.* 38 (1977).

¹¹⁶ *N.Y. Times*, March 6, 1977, at 33.

¹¹⁷ 5 U.S.C. §906(a) (1970).

¹¹⁸ Letter from Griffin B. Bell, Attorney General, to President Carter, January 31, 1977.

¹¹⁹ See Pomerance, *American Guarantees to Israel and the Law of American Foreign Relations*, JERUSALEM PAPERS ON PEACE PROBLEMS, No. 9, Dec. 1974.

that presidential authority to introduce U.S. forces into hostilities or into situations where involvement in hostilities is indicated by the circumstances shall not be inferred . . .

from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

At first glance, this resolution, absent subsequent legislation authorizing the President to act, constitutes a stunning and, in international law, perhaps illegal alteration in the conditions of U.S. accession to the North Atlantic Treaty¹²⁰ and the Inter-American Treaty of Reciprocal Assistance¹²¹ commonly known as the Rio Pact. Article 5 of the former and Article 3 of the latter both provide that an armed attack against any party to the treaty shall be considered an armed attack against them all and that each member shall come to the assistance of the state attacked. The NATO treaty uses the term "forthwith" while the Rio Pact sets "immediate" to describe the time frame for fulfilling this obligation. The NATO treaty, further, specifically includes "use of armed force" among the actions contemplated to meet an attack. However, if Section 8(a)(2) of the War Powers Resolution is applicable, the U.S. obligation, in the event of an attack on, say, France, is now no more than to convene Congress for the purpose of enacting legislation to permit the use of armed forces. This seems at variance with the NATO text, and it also looks as if Section 8(a)(2) had altered fundamentally the expectations of the parties while depriving the agreement of its essential mutuality. Are not other parties, those without similar domestic legal encumbrances, expected to respond immediately with their NATO contingents or national forces while the U.S. Congress would merely deliberate?

To the extent these concerns are valid, they ought not to be new to our NATO partners. It does not appear that the Senate, in approving the North Atlantic Treaty (much less the Rio Treaty), meant to delegate additional powers to the President. Nor was the Senate secretive about its intent. At the time the treaty was submitted to the Senate for ratification, the Senate Foreign Relations Committee's report asked:

[W]ould the United States be obligated to react to an attack on Paris or Copenhagen in the same way it would react to an attack on New York City? In such an event does the treaty give the President the power to take any action, without specific congressional authorization, which he could not take in the absence of the treaty?

The answer to both these questions is "No."¹²²

The Committee added that

[it] does not believe it appropriate in this report to undertake to define the authority of the President to use the armed forces. Nothing in the treaty, however, including the provision that an armed attack against one shall be considered an armed attack against all, increases or decreases the constitutional powers of either the President or the Congress. . . .¹²³

¹²⁰ 63 Stat. 2241, TIAS No. 1964, 34 UNTS 243.

¹²¹ 62 Stat. 1681, TIAS No. 1838, 21 UNTS 77.

¹²² S. REP. NO. 8, 81st Cong., 1st Sess. 14 (1949).

¹²³ *Id.*

Secretary of State Acheson, agreeing with this interpretation, said in reference to Article 5:

This does not mean that the United States would automatically be at war. . . . Congress alone has the power to declare war. The United States would be obligated by the treaty to take promptly the action which it deemed necessary to restore and maintain the security of the North Atlantic area. That decision as to what action was necessary would naturally be taken in accordance with our constitutional processes.¹²⁴

In the intervening years, beginning with the Korean war, the President has increasingly argued that these "constitutional processes" leave the decision to use force essentially with him. In the case of the NATO and Rio treaties, moreover, that assertion of inherent power is buttressed by the terms of a treaty which states, as a matter of U.S. law, that an attack on other treaty parties shall be regarded as if it were an attack on the United States. This gives rise to an argument based on inherent presidential power. It is perhaps no longer debatable that an actual attack on the United States would permit the President to respond with armed force without prior congressional authorization. Does the Senate-approved "as if" clause give the Commander in Chief the same right (in U.S. law) and duty (in international law) in respect of an attack on other treaty states? Or is the "as if" clause poetic license? Does the "as if" formula actually connote that a state which is to be regarded *as if* it were part of the United States is evidently *not* part of the United States for the purposes of invoking the President's power as Commander in Chief? Such an interpretation of a comparable "as if" clause is made by the Executive itself in respect of Article IV of the Hay-Bunau-Varilla Treaty of 1903,¹²⁵ which gives rights to the United States as if it had acquired sovereignty over the Canal Zone. In that context, the Department of State argues that "as if" clauses precisely and logically deny the reality of the very legal simile they postulate.

On the other hand, the concern about the effect of the War Powers Resolution's restatement of the constitutional position proceeds, at least in the case of NATO, from a failure to comprehend the facts on which the law operates. It is most unlikely that a serious attack can be launched on America's European allies without U.S. forces also being endangered or attacked, in which event the inherent powers of the Commander in Chief come into play. It thus appears that Section 8 does, after all, leave matters much as they were: the NATO and Rio agreements permit the President to use U.S. armed forces if U.S. forces are, or are about to be, attacked. In the event—unlikely in the case of NATO—that U.S. forces are not involved when an attack is launched on a treaty partner, Congress would have to authorize use of the armed forces. The President remains free, however, and obligated in international law, to give other forms of assistance until use of U.S. forces is permitted by Congress. This interpretation

¹²⁴ S. Doc. No. 123, 81st Cong., 1st Sess. 1337 (1949).

¹²⁵ Convention between the United States and Panama for the Construction of a Ship Canal, Nov. 18, 1903, 33 Stat. 2234, TS No. 431.

is further confirmed by the otherwise inconsistent provision in Section 8(d) stating that nothing in the War Powers Resolution "is intended to alter . . . the provisions of existing treaties. . . ."

IX.

REFORM OF THE WAR POWERS RESOLUTION

We appreciate not only that those who cannot learn the mistakes of history are condemned to repeat them but also, conversely, that those who keep their eyes glued to the mistakes of history are likely to stumble into new pitfalls. It is not the contention of this article that future Vietnam-type fiascoes can be prevented by stripping the President of the powers that are essential to a strong U.S. presence in the international arena.

We do accept, however, that there is a wisdom in the constitutional system of checks and balances. At the base of the argument about the war power is a dispute about the extent to which the balancing rules of our democracy are applicable to the conduct of foreign relations. The case against the concentration of the foreign relations power in the Presidency is really a case for as open and direct a process of public participation in the making of foreign as of domestic policy.

The case for treating foreign policy as a different, more exclusive process rests on the need for speed in responding to an actual or imminent attack and for secrecy in some aspects of communications, information gathering, and covert operations. The argument is not without merit in a minute percentage of cases. However, most foreign policy decisions, and even most U.S. commitments to the use of force, do not, or need not, occur in an aura of crisis and secrecy. As for the exceptional cases, consultation with a designated group of congressional representatives need be neither more time consuming nor more dangerous to security than the consultations between the President and members of his staff and cabinet.

Beyond the need for secrecy and dispatch, argue those who wish foreign relations handled differently from domestic issues, lies the need for experience, expertise, and immunity to parochial interests. Only the Presidency can supply these elements. It is true, of course, that the President and Vice President are the only public officials in the federal government elected by all the people; but therein lies weakness as well as strength. They, alone, cannot reflect the complexity, diversity, and varying degrees of intensity of American opinion. Only the Congress mirrors that reality, however imperfectly. Not that the wisdom of the public or of Congress is of a higher order than that of the President and the often gifted amateurs and professionals who make up his foreign relations establishment. Early congressional enthusiasm for the Vietnam war does not bear out a claim to higher wisdom. However, warmaking, even limited warmaking which gradually slides into something more, is too serious a commitment of U.S. blood and wealth to be made without full debate and measured decision, yielding the palpable support of the *vast majority*—not just *most*—of the American public. It is only in Congress that the degree of public support

can be assessed, as well as the extent and intensity of opposition. The Constitution, by entrusting to Congress the power to declare war, except when an instant response is essential or a considered response precluded by action of the enemy, has tried to protect the Commander in Chief from leading the nation where it will not, or, because of the intensity of internal divisions, cannot follow.

The War Powers Resolution is an imperfect instrument, drafted not so much by sponsors after careful legal staffwork as by a joint committee of the two Houses attempting to reconcile two quite different prescriptions for the commonly perceived problem. In some respects it goes too far, in others not far enough to achieve its purpose. Now, after four years and five cases, a reconsideration and revision is both possible and desirable.

A. Consultation

In none of the five instances (Danang, Saigon, Phnom Penh, *Mayaguez*, and Lebanon) was there genuine consultation before introduction of U.S. forces into areas where fighting was underway. To the extent there was consultation, it was in the form of briefings and came after irrevocable commitments of forces had already been made. In the evacuations of Danang, Saigon, Phnom Penh, and Lebanon, it was argued that humanitarian rescue, not military action, was the purpose of the operation and that there was no legal requirement to consult. Yet this distinction is meaningless, for it depends not merely on what the President intends but on how the enemy responds. In each case, including the *Mayaguez* where consultation was clearly required by law, the President informed congressional leaders. He did not consult in any meaningful sense.

To remedy this, consultation under Section 3 should be required at least 24 hours prior to any presidential decision to commit U.S. forces under any of the circumstances contemplated by Section 4(a)(1). That section should also be amended by adding to the recital of situations requiring consultation those in which U.S. forces are introduced "into any situations in which there is armed conflict." Obviously, such consultation would have to be limited, under strict congressional security self-regulation, to a small bipartisan group of leaders committed to being on call at all times. There should be a narrowly drafted exception to this requirement covering emergency situations that make an instant response essential to prevent irreparable injury to the United States, its armed forces, or its citizens. In such circumstances, there should be consultation at the earliest practicable time. Consultation should be defined, as by the Eagleton amendment, to mean "discuss fully and seek the advice and counsel" of a defined group.

B. Reporting to Congress

If consultation procedures are tightened up, the deficiencies of the reporting requirements, as made apparent in the four Indochina cases, become less important. It is probably not realistic to expect the President

to report to Congress as a whole while an operation is still in its inceptive stage. But it is quite realistic to expect him to consult with a small number of leading members before U.S. forces are used.

C. Disapproval by Congress

The automatic 60/90-day termination provision and the concurrent resolution procedure (Sec. 5(b) and (c)) are probably unworkable and possibly unconstitutional for reasons suggested above. In their place, Congress should revert to the original Senate scheme, partly still embodied in Section 2(c)(3), which enumerates the circumstances in which presidential use of force is authorized. Subject to procedural consulting and reporting requirements, the President should be authorized to use the armed forces in these limited circumstances. They should certainly include the use of force to repel an actual or apprehended attack on the territory of the United States or on its forces abroad and, perhaps, for the rescue and evacuation of U.S. civilians endangered abroad. The provision need not state whether the President's authority to act in these cases is derived from this act of congressional delegation or from the Constitution. Nor should an attempt be made to limit the exact period during which the armed forces may be used for these purposes.

The principal problem is not to confine presidential wars to 60 days but to restrict them to situations of actual or imminent attack on U.S. territory, on the armed forces, and, perhaps, on civilians abroad. If the President, despite such statutory restrictions and strengthened provisions for consultation, determines to use the armed forces in unauthorized circumstances or for purposes that are, arguably, not within the authorized categories, then a revised resolution should make provision for employing the undisputable and constitutionally unlimited congressional jurisdiction over funding. The War Powers Resolution should be amended to stipulate that no funds may be expended by the President for use by the armed forces in any case enumerated in Sections 4(a) (1), (2), or (3) except when that use is in response to actual or imminent attack on U.S. territory or its armed forces or for purpose of evacuating endangered U.S. civilians.¹²⁶ This "prior restraint"¹²⁷ would be more effective than the current termination provisions in Section 5 because: (a) it is a more securely constitutional remedy than the concurrent resolution procedure, (b) it does not challenge (or confirm) presidential power to conduct an authorized operation as Commander in Chief but merely terminates funding if it is not an authorized operation, and (c) it takes effect immediately upon

¹²⁶ Such "no funding" provisions are to be found in other acts of general application. See 22 U.S.C. §2680 (Supp. V 1975), as amended by Act of Oct. 26, 1974, Pub. L. No. 93-475, §11, 88 Stat. 1439. The resolution, if so amended, should stipulate that it should not be deemed to have been repealed by any subsequent authorization or appropriation of funds unless an intention to effect repeal is explicitly stipulated. 22 U.S.C. §2680(a)(3)(A) (Supp. V 1975).

¹²⁷ Glennon, *supra* note 1, at 33-35.

commencement of an unauthorized operation, not upon the subsequent exercise of congressional discretion.

Nevertheless, the failure of a comparable funding limitation to prevent the President's initiating military operations in the case of the *Mayaguez* leaves room for doubt as to the efficacy of this device when it stands alone. The revised resolution could anticipate that contingency by establishing the justiciability of an action to test the constitutionality and ultra vires of a presidential use of force. To do this, the resolution might also address itself to the questions of standing and remedies.

Justiciability and standing could be provided by stipulating in the amended resolution that no court in the United States shall decline, on ground that it is a nonjusticiable or political question, to make a determination on the merits, giving effect to the Constitution of the United States and to this resolution, in any case in which a claim of ultra vires is asserted against the President as Commander in Chief by Congress or an appropriate congressional committee, in an action arising out of the introduction by the President of the armed forces into hostilities.¹²⁸ The Congress, or any committee of Congress seized of the matter, should specifically be accorded standing to pursue such a claim against the President.¹²⁹ The courts should not, however, be put in the position of actually stopping a war, a politically loaded task. Thus the resolution should address itself to the

¹²⁸ The model for a statutory determination of justiciability is found in the "Hickenlooper Amendment" to the Foreign Assistance Act of 1961 which requires the courts to apply international law in cases of foreign expropriation of U.S. assets rather than decline to decide on the merits by reference to the act of state doctrine. 22 U.S.C. §2370(e) (2) (1970). The U.S. Court of Appeals has also held that subpoenas for White House tapes sought by the Senate Select Committee in an action against the President of the United States raised justiciable issues after Congress had enacted a specific statute conferring jurisdiction (*Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974)) even though the District Court had declined so to hold (*Senate Select Committee on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973)) before the statute was enacted. (Act of Dec. 18, 1973, Pub. L. No. 93-190, 87 Stat. 736, to be codified as 28 U.S.C. §1364.)

¹²⁹ The district and circuit courts accepted the standing of the Congressional Committee in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973), 498 F.2d 725 (D.C. Cir. 1974). Absent such legislative grant of standing, the position is left unclear by the tendency of courts to bypass the issue on their way to a decision based on justiciability. *Drinan v. Nixon*, 364 F. Supp. 854, 856 (D. Mass. 1973); *Harrington v. Schlesinger*, 373 F. Supp. 1138 (E.D.N.C. 1974); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973). However, where the legislature has specified standing, courts have tended to accommodate to that determination. The proposition that judicial determination as to standing and justiciability will take into account the determination of Congress expressed in legislation is supported by *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). In a concurring opinion Justice White, joined by Justices Blackmun and Powell, said:

Absent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioners' complaint in this case presented a case or controversy within the jurisdiction of the District Court under Art. III of the Constitution. But with that statute purporting to give all those who are authorized to complain to the agency the right also to sue in court, I would sustain the statute insofar as it extends standing to those in the position of the petitioners in this case.

Id. 212.

question of judicial remedy. An amendment could provide that an interlocutory or permanent injunction restraining the President in the preparation or conduct of military operations not be granted by any court until after the exhaustion of all legal remedies and until the Supreme Court of the United States is satisfied that its judgment cannot be effected by agreement between the parties.¹³⁰

The effect of such a provision would be to recognize the role of the Court as impartial umpire in a kind of controversy which, by its nature and by the circumstances in which it is most likely to arise, can engender the most powerful and destructive passions. The Court would not be cast adrift on uncharted political seas, for there is ample textual and historic evidence to guide judges in making principled decisions in this area. Nor are there overriding policy reasons for judicial reticence since both lives and the integrity of the system of government by law are likely to be at stake. Neither is there danger of the courts' preempting the role of the coordinate political branches, for adjudication would occur precisely at the request of one coordinate branch in conflict with another. In such conflict, only the courts could end the "potential of embarrassment from multifarious pronouncements by various departments on one question."¹³¹

Still, there is reason to hope that umpires will not be needed. If it is generally understood, as it now appears to be, that Presidents in a nuclear age must have the flexibility to respond instantly to a major threat to the United States but that, otherwise, no President should ever shoulder, alone, the burden of initiating a significant commitment of American lives and fortune, then the basis exists for civilized accommodations between Congress and the Executive.

¹³⁰ To preclude a "sudden death" injunction by a court against the President as Commander in Chief that would preclude an orderly, phased termination of an ultra vires presidential war, the proposal draws upon the language of two former federal laws restraining the granting of district court injunctions against enforcement of state and federal statutes on grounds of their unconstitutionality. 28 U.S.C. §§2281, 2282 (1970). For the general proposition that Congress may make "consent" laws which require the courts to reassess their earlier interpretation of a separation-of-powers provision of the Constitution, see *In re Rahrer*, 140 U.S. 545 (1891), *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Cf. *Edelman v. Jordan*, 415 U.S. 651 (1974).

¹³¹ The Supreme Court has laid down the test of justiciability in *Baker v. Carr*, 369 U.S. 186 at 217 (1962):

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a policy decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

In *Drinan v. Nixon*, 364 F. Supp. 854, 858 (D. Mass. 1973), the court said that: should it be apparent that the political branches themselves are clearly and resolutely in opposition as to the military policy to be followed by the United States, such a conflict could no longer be regarded as a political question, but would rise to the posture of a serious constitutional issue requiring resolution by the judicial branch.

ISLANDS AND THE DELIMITATION OF THE CONTINENTAL SHELF: A FRAMEWORK FOR ANALYSIS

By Donald E. Karl *

This article examines one of the recurring problems in the law of the sea—the treatment of islands in the delimitation of the continental shelf between opposite and adjacent states—in light of developments at the Third UN Conference on the Law of the Sea, in particular, the adoption of “equitable principles”¹ as the standard for delimitation of the continental shelf and exclusive economic zone between adjacent and opposite states.² On the assumption that the content of these equitable principles may be derived from contemporary state practice in maritime delimitations, this state practice is used as a basis for the construction of an analytical model of the continental shelf problem of islands. This model relies primarily on an island’s relative location and secondarily on its relative size with respect to the delimiting states. It provides a framework for determining how an island should be treated in a given delimitation. Though the model is, out of necessity, based upon state practice in continental shelf delimitations, the premises underlying the model are not so limited and thus the general principles derived from this analysis will have an important bearing on the new problem of the delimitation of the exclusive economic zone.

I.

THE CONTINENTAL SHELF PROBLEM OF ISLANDS

It is undisputed that islands³ have continental shelves.⁴ It is this fact

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¹ In conformity with the view taken by the International Court of Justice in the *North Sea Continental Shelf* cases, [1969] ICJ REP. 3, [hereinafter cited as [1969] ICJ REP.].

² Informal Composite Negotiating Text, Arts. 74 and 83, UN Doc. A/CONF.62/WP.10 (1977) [hereinafter cited as Composite Text].

³ For the purposes of this article, “island” refers only to *dependent* insular territories, and thus it is assumed that independent insular states should be treated no differently from mainland states. This assumption will sometimes lead to apparently inconsistent treatment for similarly situated islands depending on their political status, but it is felt that the assumption is necessary to reflect the favored position of independent states in the emerging body of the law of the sea. See, e.g., the Transitional Provision of the Composite Text, *supra* note 2, at 153; see also note 14, *infra*. The assumption is discussed and reexamined in notes 99, 108, *infra*.

The operative definition of “island” is presently contained in Article 10(1) of the Convention on the Territorial Sea and Contiguous Zone, done April 29, 1958, 15 UST

that often complicates the process of delimitation between opposite and adjacent states. The possibility that the presence of islands could create obstacles to the delimitation of continental shelf areas was recognized by early commentators⁵ on the continental shelf doctrine and was the subject of some discussion and debate by the International Law Commission in its preparations for the First UN Conference on the Law of the Sea.⁶ However, at the Conference itself, parochialism and the delegates' inability to reconcile their conflicting interests⁷ resulted in the absence of any explicit reference to islands in Article 6 of the 1958 Convention on the Continental Shelf.⁸

This state of affairs has not changed appreciably with the passage of time, as is evidenced by the proceedings at the Third UN Conference on the Law of the Sea. The common thread running through almost all of

1606, TIAS No. 5639, 516 UNTS 205, 52 AJIL 834 (1958) (effective Sept. 10, 1964):

An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

This definition has been retained *verbatim* in Article 121, paragraph 1, of the Composite Text, *supra* note 2.

⁴ Convention on the Continental Shelf, *done* April 29, 1958, 15 UST 471, TIAS No. 5578, 499 UNTS 311, 52 AJIL 858 (1958) (effective June 10, 1964), Art. 1; Composite Text, Art. 121, para. 2, *supra* note 2.

⁵ See Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. Y.B. INT. L. 376, 410 (1950); Boggs, *Delimitation of Seaward Areas under National Jurisdiction*, 45 AJIL 240, 251-53, 256-59 (1951).

⁶ See, e.g. [1951] 1 Y.B. INT. L. COMM. 411, UN Doc.A/CN.4/Ser.A/1951; [1953] 1 Y.B. INT. L. COMM. 126-34, UN Doc.A/CN.4/Ser.A/1953.

⁷ For example, both Italy and Iran submitted proposals which gave little or no effect to islands in continental shelf delimitations but were designed to protect their continental shelf interests vis-à-vis neighboring states with insular territories. See Italy: proposal, UN Doc.A/CONF.13/C.4/L.25/Rev.1, 6 UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFF. RECS., 4th Comm. (Continental Shelf), UN Doc.A/CONF.13/42 at 133 (1958) [hereinafter cited as 6 LOS I:OR]; Iran: proposal, UN Doc.A/CONF.13/C.4/L.60, *id.* at 142.

⁸ Article 6 provides:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

.....

Convention on the Continental Shelf, *supra* note 4.

Most delegates felt that the problem of islands could best be handled by resort to the "special circumstances" exception in Article 6 although there were differences of opinion as to whether a state should always be entitled to invoke that exception when its islands were located on the continental shelf of another state. 6 LOS I:OR, *supra* note 7, at 93-95.

he draft articles submitted at the Conference⁹ was a belief that factors such as population,¹⁰ size,¹¹ economic viability,¹² geographical configura-

⁹ Prior to the Conference, in the sessions of Sub-Committee II of the General Assembly's Seabed Committee, most of the proposals were rather blunt and reflected the participants' fundamental disagreement as to whether or not islands should be accorded full rights under the regime of the continental shelf. Compare UN Doc. A/AC.138/SC.II/L.21, 28 GAOR Supp. (No. 21), Vol. III at 19-21, UN Doc.A/9021 (1973), with UN Doc. A/AC.138/SC.II/L.33, *id.* at 71. But see UN Doc.A/AC.138/SC.II/L. 43, *id.* at 98.

¹⁰ See, e.g., Turkey: draft articles on the regime of islands, UN Doc.A/CONF. 62/C.2/L.55 (1974) Art. 3(2). 3 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFF. RECS., DOCUMENTS OF THE CONFERENCE 230(1975) [hereinafter cited as 3 LOS III:OR].

The categorization of islands according to the size of their population is an incredibly complex and politically infeasible task. The maintenance of a dichotomy between inhabited and uninhabited islands would seem to be both manageable and useful. However, even this formulation has its problems because some islands, though "occupied" continuously, are not truly inhabited.

Most proposals that addressed the question of population sought to draw the line at permanent population. See, e.g., Romania: draft articles on definition of and régime applicable to islets and islands similar to islets, UN Doc.A/CONF.62/C.2/L.53 (1974), *id.* at 228-29. It has been pointed out, and rightly so, that islands which are presently unable to sustain a permanent population may be able to do so in the future if they receive the right to exploit the resources in an economic resource zone and on a continental shelf. UN Doc.A/CONF.62/C.2/SR.40 (1974) (statement of Mr. Dudgeon (United Kingdom)), 2 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFF. RECS., SUMMARY RECORDS OF MEETINGS 28 (1975) [hereinafter cited as 2 LOS III:OR].

¹¹ For example, Ireland proposed that:

... In determining a median line for the purposes of this article account may be taken of an island only if it is inhabited and if . . .
(ii) It contains at least one tenth of the land area and population of the State concerned.

Ireland: draft article on delimitation of areas of the continental shelf between neighboring States, UN Doc.A/CONF.62/C.2/L.43 (1974), 3 LOS III:OR, *supra* note 10, at 220.

The size of an island would also seem to be an important factor. If all islands were accorded full rights in the continental shelf and economic resource zone, very small islands would receive disproportionately large benefits. For example, an island one mile in diameter would receive a continental shelf area of approximately 125,000 square miles. This result may be especially disconcerting when an island is part of a larger coastal state to which most of the benefits accrue. See note 14, *infra*.

Nonetheless, as a practical matter, it is very difficult to categorize islands on the basis of size since it is impossible to "draw the lines" between categories without offending some states. But see R. HODGSON, ISLANDS: NORMAL AND SPECIAL CIRCUMSTANCES 17-18 (1973). Further, it should be noted that many insular states and large mainland states receive what might be termed "disproportionate" benefits. See generally *Theoretical Areal Allocations of Seabed to Coastal States Based on Certain United Nations Seabed Committee Proposals*, OFFICE OF THE GEOGRAPHER, DEPT. OF STATE, INTERNATIONAL BOUNDARY STUDY, SERIES A, LIMITS IN THE SEA, No. 46 (Aug. 12, 1972) [series hereinafter cited as LIMITS IN THE SEA].

¹² See, e.g., Romania: draft articles on definition of and régime applicable to islets and islands similar to islets, UN Doc.A/CONF.62/C.2/L.53 (1974), 3 LOS III:OR, *supra* note 10, at 228. The economic viability of an island will depend to some degree on the island's size and population. See UN Doc.A/CONF.62/C.2/SR.40 (1974) (statement of Mr. Dudgeon (United Kingdom)), 2 LOS III:OR, *supra* note 10, at 288.

tion, and distance from the mainland,¹³ as well as the political status¹⁴ of an island should be considered when maritime delimitations are affected by the presence of that island. Unfortunately, the majority of these proposals were merely sophisticated attempts to protect national interests,¹⁵ and thus, despite the superficial appeal of this approach, the absence of any reference to these varied characteristics of islands in the proposed articles on delimitation comes as no surprise.¹⁶

¹³ See, e.g., Turkey: draft article on delimitation between States: various aspects involved, UN Doc.A/CONF.62/C.2/L.23 (1974), 3 LOS III:OR, *supra* note 10, at 201.

¹⁴ See, e.g., Turkey: draft articles on the régime of islands, UN Doc.A/CONF.62/C.2/L.55 (1974), *id.* at 230.

At the Conference, there was considerable discussion of the political relationships of islands and mainland states. See UN Doc.A/CONF.62/C.2/SR.40 (1974), 2 LOS III:OR, *supra* note 10, at 287-89. Developing countries were concerned that the resources obtained from an island's continental shelf and economic resource zone would be used for the benefit of the mother state. *Id.* at 288; see Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta, and Zambia: draft articles on the régime of islands, UN Doc.A/CONF.62/C.2/L.62/Rev.1 (1974), 3 LOS III:OR, *supra* note 10, at 232.

Some delegates thought that political status, if at all relevant, should be discussed with respect to all dependent territories and not only islands. See, e.g., UN Doc.A/CONF.62/C.2/SR.39 (1974) (statement of Mr. Ballah (Trinidad and Tobago)), 2 LOS III:OR, *supra* note 10, at 282. Consequently many of the later proposals dealt with the political status of all dependent territories. See, e.g., Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Libyan Arab Republic, Mexico, Morocco, Nicaragua, Panama, Paraguay, Peru, and Uruguay: draft article on islands and other territories under colonial domination or foreign occupation, UN Doc.A/CONF.62/C.2/L.58 (1974), 3 LOS III:OR, *supra* note 10, at 232; Fiji, New Zealand, Tonga, and Western Samoa: draft articles on islands and on territories under foreign domination or control, UN Doc.A/CONF.62/C.2/L.30 (1974), *id.* at 210. The latter proposal formed the basis for the Transitional Provision in the Composite Text, which provides that:

The rights recognized or established by the present Convention to the resources of a territory whose people have not attained either full independence or some other self-governing status . . . shall be vested in the inhabitants of that territory, to be exercised by them for their own benefit and in accordance with their own needs and requirements.

Composite Text *supra* note 2, at 153. It should be noted that the Transitional Provision refers only to the exercise of rights in maritime zones, and hence it has no effect on the allocation or delimitation of those zones.

¹⁵ Not even the relatively innocuous proposal by France that islands be considered as "special circumstances" in the delimitation of maritime areas was included in the Composite Text. See France: draft article on the delimitation of the continental shelf or of the economic zone, UN Doc./CONF.62/C.2/L.74 (1974), 3 LOS III:OR, *supra* note 10, at 237.

¹⁶ See generally, UN Doc.A/CONF.62/C.2/SR.38-40 (1974), 2 LOS III:OR, *supra* note 10, at 278-89.

This is not meant to imply that islands were given only token consideration at the Conference. There were many delimitation formulae contained in the working papers on the regime of islands. See Informal Working Paper No. 13 (Aug. 20, 1974); Informal Working Paper No. 13/Rev. 2 (Aug. 27, 1974). It is also interesting to note that the working papers on the continental shelf contained references to islands in their various delimitation formulae while the working papers on the economic resource zone did not. Compare Informal Working Paper No. 3/Rev. 1 (Aug. 12, 1974), Informal Working Paper No. 3/Rev. 2 (Aug. 23, 1974), with Informal Working Paper

As a result, an analysis of the treatment of islands involved in maritime delimitations must begin with Article 121 of the Informal Composite Negotiating Text which provides:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of the present Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.¹⁷

Paragraph 2 is perhaps the most significant for two reasons.¹⁸ First, it raises the possibility that the application of concepts other than those relating to delimitation could indirectly give some effect to an island in a delimitation.¹⁹ Second, and more importantly, the determination of the

no. 4/Rev. 1 (Aug. 27, 1974). This distinction is evident in the first comprehensive working paper of the Conference. See Third United Nations Conference on the Law of the Sea, Main Trends (Second Committee), UN Doc.A/CONF.62/C.2/WP.1 at 48, ¶2-73 (Oct. 15, 1974). The absence of any reference to islands in the proposed articles on delimitation in the Composite Text is perhaps best explained in the report of the U.S. delegation:

What principles apply to the delimitation of the economic zone or continental shelf between adjacent and opposite States? Any precise formula will tend to divide the Conference since for each coastal State that supports a particular rule—e.g., equidistance—another naturally reacts in fear that it will lose some area. This problem has in turn given rise to arguments over the weight to be given islands in such delimitations and, even further, to arguments that small or uninhabited islands are not entitled to an economic zone at all. The realization is growing that the Conference could become hopelessly bogged down if it tries to deal definitively with essentially bilateral delimitation problems.

Third United Nations Conference on the Law of the Sea, Caracas, Venezuela, June 30–August 29, U.S. Delegation Report at 13 (undated).

¹⁷ Composite Text, *supra* note 2.

¹⁸ Paragraph 1 is identical to the definition of island contained in the 1958 Convention on the Territorial Sea and Contiguous Zone. See note 3, *supra*.

Paragraph 3 is the only remnant of the widespread interest in insular characteristics that prompted many of the proposals discussed in notes 10–14, *supra*. It is worth noting that “rocks” are left undefined in the Composite Text.

It is further worth noting that low-tide elevations, when wholly located within the territorial sea, are not denied continental shelves or exclusive economic zones, although this fact is of little operative significance. See Composite Text, Art. 13, *supra* note 2.

¹⁹ The most noteworthy examples of such concepts are (1) straight baselines drawn to and from islands and atolls and (2) the “archipelagic state.”

The use of straight baselines, first upheld in the *Fisheries* case, [1951] ICJ REP. 116, was codified in Article 4 of the 1958 Convention on the Territorial Sea and Contiguous Zone, *supra* note 3, and appears in Article 7 of the Composite Text, *supra* note 2, substantially unchanged. This concept is likely to have an effect because it is often applied in situations which are quite different from that in the *Fisheries* case. For example, Burma has drawn a baseline 222 miles in length. UNITED NATIONS LEGISLATIVE SERIES, NATIONAL LEGISLATION AND TREATIES RELATING TO THE TERRITORIAL SEA, THE CONTIGUOUS ZONE, THE CONTINENTAL SHELF, THE HIGH SEAS AND TO THE FISHING AND CONSERVATION OF THE LIVING RESOURCES OF THE SEA, UN Doc.ST/LEG/SER.B/15 at 49 (1970) [hereinafter cited as UNLS/15]. See also *Straight Baselines: Ecuador*,

continental shelf of an island is governed by Article 83, paragraph 1, of the Composite Text, which provides:²⁰

The delimitation of the continental shelf between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances.

This article closely follows the holding of the International Court of Justice in the *North Sea Continental Shelf* cases.²¹ Though that case involved a controversy between adjacent states in which the presence of islands was not an issue,²² it may nonetheless be useful to discuss the Court's opinion and the general principles of delimitation recognized therein in light of the specific problem of islands.

In the *North Sea* cases, the Court deemphasized the importance of the principle of equidistance²³ as a method of delimitation in favor of delimita-

LIMITS IN THE SEA, *supra* note 11, No. 42 (May 23, 1972); *see generally* HODGSON, *supra* note 11, at 20-23.

The "archipelagic state" is a rather recent development in the law of the sea which appears in Articles 46-54 of the Composite Text, *supra* note 2. A state qualifying as an archipelagic state is entitled to draw straight baselines between its islands and claim the waters inside as "archipelagic waters" if certain conditions are satisfied. Arts. 47 and 49, para. 1. The measurement of maritime zones from these baselines will obviously give an archipelagic state a considerable advantage in the delimitation of these zones. However, due to the limited number and geographical location of archipelagoes (*see* HODGSON, *supra* note 11, at 24-36), there are only a few situations where an archipelagic state will be able to invoke this concept to the detriment of another state. *But see Continental Shelf Boundary: India-Indonesia*, LIMITS IN THE SEA, *supra* note 11, No. 62 (Aug. 25, 1975).

²⁰ Article 74, which governs the delimitation of the exclusive economic zone, contains identical language.

²¹ [1969] ICJ REP. 3.

²² It is worth noting that the Court could have said more about islands since there were islands lying off the coasts of all three parties to the case.

Professor Goldie has suggested that these islands, the East, West, and North Frisian Islands, and, in particular, "the islands of Sylt and Borkum had the potentiality of strongly influencing, and possibly distorting continental shelf delimitations" among the three states. Goldie, *The International Court of Justice's "Natural Prolongation" and the Continental Shelf Problem of Islands*, 4 NETH. Y.B. INT. L. 237, 245 (1973). While this assertion may be partially true if Sylt and Borkum were the only islands to be given effect, the configuration of the Frisian Islands as a group would dictate that if one island is to be given effect then all should be given effect. If this were done, there would not be any significant change in the boundary line because all of the Frisian Islands follow the general direction of the coast and their inclusion would not alter the macrogeography underlying the inequitable delimitation, *i.e.*, the concavity of the coastline. Similar reasoning applies to the German island of Helgoland, although its use as a basepoint would have mitigated but not eliminated the adverse effects resulting from Germany's concave coastline.

It is further worth noting that none of the parties attempted to make the islands an issue in the case. This is undoubtedly due to the fact that the inclusion of the islands would not have altered the boundary sufficiently to cause a shift in the rights to the valuable North Sea oil deposits—the ultimate and underlying issue in the case.

²³ An equidistance line is a line which leaves to each of the states concerned all those portions of the continental shelf that are nearer to a point on its own coast

tion according to "equitable principles."²⁴ The apparent primacy of equitable principles could be viewed as revitalizing the "special circumstances" exception contained in Article 6 of the Convention on the Continental Shelf.²⁵ The presence of an island in a continental shelf area which is to be delimited by the state to which the island belongs and another state has been considered to be one of the classic instances of "special circumstances."²⁶

The *North Sea* opinion contains only one statement pertinent to the question of whether islands might qualify as special circumstances for the purpose of continental shelf delimitation.²⁷ The Court stated that, in the delimitation of a continental shelf between opposite states, it is appropriate to ignore "the presence of islets, rocks and minor coastal projections, the

than they are to any point on the coast of the other state. An equidistance line may consist of a "median" line between opposite states or a "lateral" line between adjacent states. For a detailed description of the principle of equidistance, see E. BROWN, *THE LEGAL REGIME OF HYDROSPACE* 71-73 (1971).

²⁴ The Court held that:

(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;

(2) if, in the application of the preceding subparagraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, use, or exploitation for the zones of overlap or any part of them.

[1969] ICJ REP. 3, 53. The Court went on to specify the "relevant circumstances" that were to be taken into account in effecting a delimitation according to equitable principles.

(1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;

(2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;

(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.

Id. at 54.

²⁵ *Supra* note 4.

²⁶ See [1953] 1 Y.B. INT. L. COMM. 128-32, UN Doc. A/CN.4/SER.A/1953; 2 *id.* at 216. Most commentators also thought that islands were to be dealt with under the "special circumstances" rubric. See, e.g., Gutteridge, *The 1958 Geneva Convention on the Continental Shelf*, 35 BRIT. Y.B. INT. L. 102, 120 (1959) ("One clear example of special circumstances' is . . . the presence of islands"); Padwa, *Submarine Boundaries*, 3 INT. & COMP. L.Q. 628, 647 (1960) ("If all islands were included for purposes of measurement, it might lead to extremely inequitable and implausible results in determining the boundary.")

²⁷ Early in its opinion, the Court did restate the contention of the Netherlands and Denmark that special circumstances did not include a concave coastline, such as that of the parties on the North Sea, but referred only to situations such as the presence of islands. [1969] ICJ REP. 3, 20. The Court did not comment upon the validity of this statement.

disproportionately distorting effect of which can be eliminated by other means.”²⁸ While this statement apparently limits the application of the special circumstances exception, it can also be interpreted as sanctioning the invocation of that exception when islands, as opposed to islets, rocks, and minor coastal projections, are involved. However, this conclusion must be scrutinized in light of the Court’s explanation of the use of equitable principles in continental shelf delimitation:

Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. *Equality is to be reckoned within the same plane*, and it is not such natural inequalities as these that equity could remedy. But in the present case there are *three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequality is created.* What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation but, *given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which unjustifiable difference of treatment could result.* (Emphasis added).²⁹

There is no doubt that many islands may be viewed as “incidental special features” which, if given full effects in continental shelf delimitations, would cause an “unjustifiable difference of treatment.”³⁰ A simple example will suffice to demonstrate the validity of this proposition.

The top half of Diagram I shows three adjacent states whose “coastlines are . . . comparable in length”³¹ and each of which owns several offshore islands. A continental shelf delimitation using the principle of equidistance is indicated by the dashed and dotted line, while a delimitation according to equitable principles (in this case, basically ignoring the distorting effect of the islands) is shown by the dashed line. The resulting differences are striking. The use of the equidistance method denies State B “treatment equal or comparable to that given the other two” states despite the fact that all three states “have been given broadly equal treatment by nature.”³²

The bottom half of Diagram I illustrates the situation in the *North Sea* cases, which is analogous to that depicted in the top half both in macro-geography and in the inequitable delimitations that result from the use of

²⁸ *Id.* at 36.

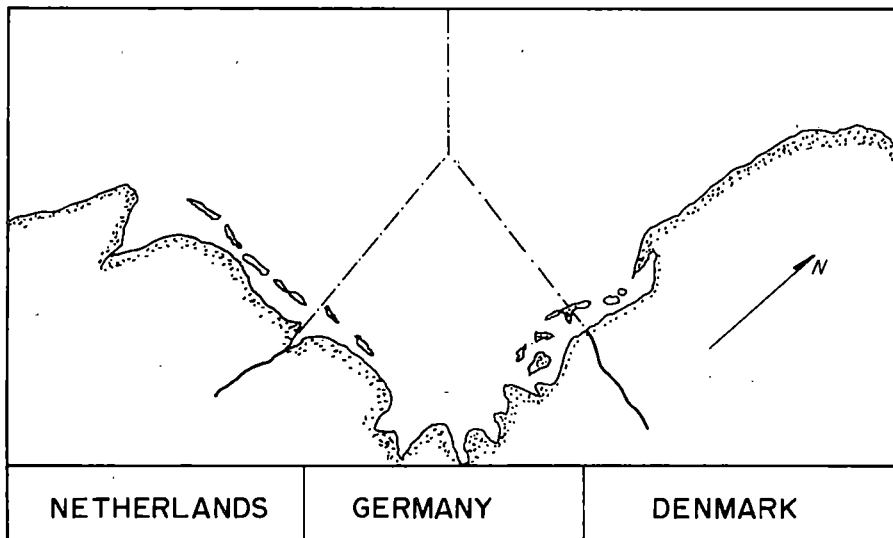
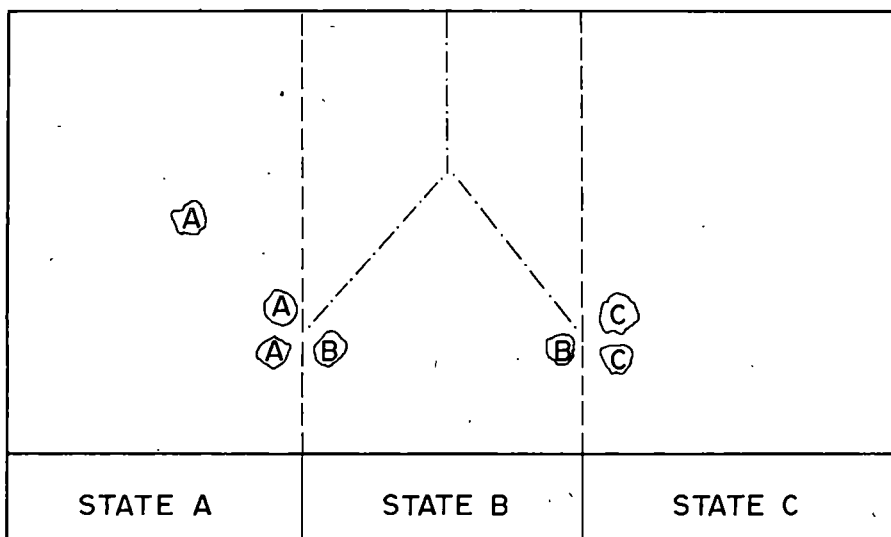
³⁰ *Id.* at 50.

³² *Id.*

²⁹ *Id.* at 49–50.

³¹ *Id.*

DIAGRAM I

Geographical Comparison of Offshore Islands to
Concave Coastal Configuration

the principle of equidistance. If the Court's emphasis on equitable principles is viewed as a refusal to give full weight to the *mainland* because of the overall coastal configuration, then it would seem to follow that islands, which have the potential to produce equally inequitable results, should be treated in similar fashion and should be given less than full effect in continental shelf delimitations. Thus, the Court's adoption of the criterion of "equitable principles," when read in light of the opinion as a

whole, does not sanction the wholesale classification of islands as "special circumstances" but rather seems to imply that the presence of islands is just one additional factor to be considered in assessing the "relevant circumstances" as they affect a delimitation according to those equitable principles.³³

This extension of the rationale of the *North Sea* cases to the problem of the continental shelf of islands minimizes the significance of islands in continental shelf delimitations. Unfortunately, the analogy can be carried only so far and thus both the decision and the Composite Text are of limited utility in determining how an island should actually be treated in a specific situation. To obtain some insight into this problem, it is instructive to examine the bilateral and multilateral agreements on continental shelf delimitation to see *how* and *if* the Court's "equitable principles" have manifested themselves in state practice.

II.

AN ANALYTIC MODEL OF CONTINENTAL SHELF DELIMITATIONS INVOLVING ISLANDS

A. BACKGROUND

Contemporary state practice is the single most important perspective in which to pursue an investigation of the treatment of islands in continental shelf delimitations.³⁴ It is my belief that this state practice provides a substantial basis for the formulation of an analytic model of continental shelf delimitation which relies primarily on the location of an island with respect to the delimiting states and on the location of the delimiting states with respect to one another.³⁵ However, before describing the model in detail, the four major premises underlying it must be explained.

³³ See note 24, *supra*.

³⁴ In an interesting and original article, Northcutt Ely surveyed state practice up to 1971 and found that the presence of small islands (islets in his terminology) has generally been ignored for the purpose of delimitation though these islets have often been conceded a maritime zone not exceeding twelve miles in width which he equated with the contiguous zone. Ely, *Seabed Boundaries Between Coastal States: The Effect to be Given Islets as "Special Circumstances,"* 6 INT. LAWYER 219, 235-36 (1972). He concluded that:

... an islet which is denied effect as a basepoint for the calculation of a median line as against an opposite coast, or the calculation of an equidistance line between adjacent States on the same coast, for demarcation of continental shelf boundaries, is, nevertheless, to be accorded continental shelf rights in an area of the seabed and subsoil co-extensive with its 12-mile contiguous zone.

Id. at 236.

³⁵ It is necessary to state two *caveats* on the use and interpretation of state practice. First, and most important, agreements on delimitation do not always disclose the method employed to arrive at a boundary line, if indeed a "method" was used. In such cases there is obviously considerable latitude for speculation as to how the agreed boundary was located. Consequently, in my use of this state practice in support of the model, I am only saying that my proposed framework for the treatment of islands would lead to a similar delimitation and *not* that the principles advanced herein were in fact used to fix that line.

Second, the very existence of an agreement implies that disincentives to agreement, such as the presence of islands, either were regarded as insignificant by the parties or

First, the equidistance method is the primary mode of delimitation. A modified principle of equidistance³⁶ appears to have provided the framework for delimitation in almost all of the continental shelf³⁷ delimitations

were overcome by independently operating incentives such as the desire to exploit resources. In either case, care must be taken in the generalization of principles contained or exemplified in these agreements to *all* delimitation disputes.

³⁶ The application of the principle of equidistance rarely takes the pure form where all points on the median or lateral line are equidistant from the nearest points on the baselines. See note 23, *supra*. Rather, the boundary lines are drawn by connecting equidistant or nearly equidistant points with straight line segments. See, e.g., *Continental Shelf Boundary: Finland-Sweden*, LIMITS IN THE SEA, *supra* note 11, No. 71 (June 16, 1976). This is a choice of convenience and not a disavowal of the principle of equidistance. If *every* point on an equidistance line were required to be an equal distance from the coasts of the delimiting states, it would be difficult to make an at-sea determination of the line when the states involved have even slightly irregular coastlines. However, under the modified application of the principle, the chosen equidistant or reference points can be marked with a buoy.

The number of reference points that are used will depend on the geographical configuration of the coasts, the size of the area to be delimited, and the states' desire for an exact delimitation. Most boundaries between opposite states are composed of only 10-20 reference points. See, e.g., *Agreement between Sweden and Norway concerning the delimitation of the continental shelf*, UNITED NATIONS LEGISLATIVE SERIES, NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, UN Doc. ST/LEG/SER.B/16 at 413 (1974) [hereinafter cited as UNLS/16], *Continental Shelf Boundary: Norway-Sweden*, LIMITS IN THE SEA, *supra* note 11, No. 2 (Jan. 22, 1970). Boundaries between adjacent states have been composed of a single line segment joining two points. See, e.g., *Maritime Boundary: Brazil-Uruguay*, *id.* No. 73 (Sept. 30, 1976). However, the delimitation of the continental shelf between Canada and Greenland (Denmark) required 127 reference points due to the size of the area, the irregular coastlines, and the need for precise boundaries in light of the possible resources involved. *Agreement between Canada and Denmark relating to the delimitation of the continental shelf between Greenland and Canada*, UNITED NATIONS LEGISLATIVE SERIES, NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, UN Doc. ST/LEG/SER.B/18 at 447 (1976) [hereinafter cited as UNLS/18].

³⁷ The state practice in *territorial sea* delimitations must be scrutinized thoroughly before drawing generalizations about all delimitations. The formula for delimitation of the territorial sea is similar to that for the continental shelf. Compare Article 12 of the Convention on the Territorial Sea and Contiguous Zone, *supra* note 3, with Article 6 of the Convention on the Continental Shelf, *supra* note 4. This may not be so in the future if the proposed articles in the Composite Text are adopted. Compare Composite Text, Article 15 with Article 83.

In any event, many territorial sea delimitations do not employ the equidistance method (and ignore the presence of islands) due to the necessity of dividing the territorial sea along the mid-channel line or *thalweg*. See *Déclaration between the Danish and Swedish Governments concerning the boundaries of the Sund*, UNITED NATIONS LEGISLATIVE SERIES, LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA, UN Doc. ST/LEG/SER.B/6 at 792 (1957); *Territorial Sea Boundary: Denmark-Sweden*, LIMITS IN THE SEA, *supra* note 11, No. 26 (July 16, 1970) (note that the island of Ven is ignored); *Argentina-Uruguay: Treaty concerning the La Plata River*, 13 ILM 251 (1974); *Continental Shelf Boundary: Argentina-Uruguay*, LIMITS IN THE SEA, *supra*, No. 64 (Oct. 24, 1975) (note points 9-18 on the agreed boundary line); *Maritime Boundary: Federal Republic of Germany-German Democratic Republic*, *id.* No. 74 (Oct. 5, 1976); *Continental Shelf Boundary: Finland-Sweden*, *supra* note 36 (the treatment of the Aland Islands was partially dictated by two earlier treaties which were regarded by the states as "special circumstances within the meaning of the Geneva Convention").

to date.³⁸ This premise simply recognizes the fact that the requirement that delimitations be carried out in accordance with "equitable principles" will be satisfied by resort to the equidistance method in most instances.³⁹

Second, in a delimitation according to equitable principles, a "reasonable degree of proportionality"⁴⁰ should exist between the effect given an island in a delimitation and the island's coastline, measured in some objective fashion,⁴¹ relative to the coastlines of the delimiting states.⁴² Since most islands are insignificant in size relative to the state to which they belong, these islands should generally be ignored for the purpose of delimitation.

Third, an island is entitled to a territorial sea even though the island has been ignored in the delimitation of the continental shelf.⁴³ The choice of the territorial sea as the primary measure of the maritime area to be allocated to an island is dictated by the fact that the incidents of sovereignty that attach to the territorial sea are much more basic to the integrity of a state as a whole than the rights which are exercised in other maritime jurisdictional zones. Thus, a normal territorial sea is the minimum area that must be accorded an island, unless a lesser area is specifically agreed to by the state to which the island belongs.⁴⁴ That state is entitled to exercise continental shelf rights in the seabed and subsoil beneath the island's

³⁸ But see *Continental Shelf Boundary: Trinidad & Tobago-Venezuela*, LIMITS IN THE SEA, *supra* note 11, No. 11 (Mar. 6, 1970). The radical departure from the equidistance method was required by an earlier treaty dividing the Gulf of Paria which was still in effect. See *Treaty relating to the submarine areas of the Gulf of Paria*, UNITED NATIONS LEGISLATIVE SERIES, LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS, UN Doc.ST/LEG/SER.B/1 at 44 (1951).

See also *Maritime Boundary: Colombia-Ecuador*, LIMITS IN THE SEA, *supra* No. 69. (April 1, 1976).

³⁹ For convenience, it is initially assumed that there are no geographic abnormalities, such as the concave coastline of the *North Sea* case, that must be considered other than the presence of islands on the continental shelf. However, this assumption is not critical and the application of the model in a situation where both the presence of an island and a concave coastline interact to complicate a delimitation will be discussed later. See notes 101-10, *infra*, and accompanying text.

⁴⁰ [1969] ICJ REP. 3, 54.

⁴¹ One possible objective approach to the problem of measuring insular coastlines is developed in notes 80-89, *infra*, and accompanying text.

⁴² See [1969] ICJ REP. 3, 54.

⁴³ Ely chose to employ the contiguous zone as the measure of the minimum area to which an island is entitled. Ely, *supra* note 34, at 235-36. He based this choice on a statement in the *North Sea* cases that the nature of the contiguous zone was very similar to that of the continental shelf in that they were both relatively recent incursions on the once free high seas. *Id.* at 235. See [1969] ICJ REP. 3, 51.

This line of reasoning is rather unconvincing. His choice of the contiguous zone may have been a choice of convenience in that the breadth of that zone was set at twelve miles while the breadth of the territorial sea was unspecified under the 1958 Convention on the Territorial Sea and Contiguous Zone, *supra* note 3 (Arts. 6 and 24).

⁴⁴ This is only likely to occur when an island is located in a strait or other narrow body of water. See, e.g., *Bahrain-Saudi Arabia boundary agreement*, UNLS/16, *supra* note 36, at 409; *Continental Shelf Boundary: Bahrain-Saudi Arabia*, LIMITS IN THE SEA, *supra* note 11, No. 12 (Mar. 10, 1970). See notes 67-69, *infra*, and accompanying text.

territorial sea and, of course, no state is entitled to extend its continental shelf area beneath the territorial sea of an island belonging to another state. The width of this territorial sea will be assumed to be twelve miles unless otherwise noted.⁴⁵

Fourth, the fact that an island and a state are adjacent to the same geological continental shelf, regardless of whether or not the island belongs to that state, is of minimal significance in the delimitation of the legal continental shelf. Although the 1958 Convention defined the shelf in terms of the 200-metre isobath, and beyond that depth in terms of the open-ended "exploitability" criterion,⁴⁶ neither contemporary state practice nor the Composite Text supports this limitation any longer. The Composite Text defines the shelf as the "natural prolongation"⁴⁷ of a state's land and territory out to the edge of the continental margin or to a distance of 200 miles if the continental margin does not extend up to that distance.⁴⁸ Thus, the focus in a continental shelf delimitation should not be on the physical characteristics of the offshore areas but rather, assuming that these areas are the "natural prolongations"⁴⁹ of the land territories of the delimiting states out to the 200-mile limit, on the equitable allocation of those areas.⁵⁰

3. THE MODEL: ISLAND LOCATION AND THE "ZONES OF DISTORTION"

In order to provide a conceptual framework for analyzing the continental shelf problem of islands and for classifying the contemporary state practice in that area, I have constructed four "zones of distortion" which exist in delimitations between opposite (Diagram II) and adjacent (Diagram III) states.⁵¹ Each zone is a measure of the distorting effect

⁴⁵ The territorial sea has a maximum width of twelve miles under Article 3 of the Composite Text, *supra* note 2, which may lead to some uniformity in the state practice. It should be noted that the model developed in the following pages will decrease in usefulness as the widths of the territorial seas claimed by states significantly increase beyond twelve miles (*e.g.*, thirty miles) though the model will still be applicable in principle.

⁴⁶ Convention on the Continental Shelf, *supra* note 4, Art. 1.

⁴⁷ This phrase, as was "equitable principles," was adopted from the *North Sea* judgment. See [1969] ICJ REP. 29-31, 36-37, 39-40, 43-44, 47, 51.

⁴⁸ Article 76 states:

The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

If the continental margin is defined in terms of the 200-metre isobath, only five states will benefit from this provision—Argentina, Australia, Canada, the United States, and the Soviet Union. See *Theoretical Areal Allocations of Seabed to Coastal States Based on Certain United Nations Seabed Committee Proposals*, *supra* note 11.

⁴⁹ The definition in Article 76 in essence classifies the area within the 200-mile limit as the "natural prolongation" of the land territories of the states involved.

⁵⁰ See [1969] ICJ REP. 3, 52-54.

⁵¹ There are three assumptions inherent in the diagrams. First, the width of the territorial sea (TS) is assumed to be twelve miles or less. See note 45, *supra*. Sec-

that an island located in that zone would, if used as a basepoint in a delimitation, have on the equidistance line drawn without taking into account the presence of that island.

In general, Zone A is the area of minor or no distortion where the use of an island as a basepoint for the calculation of an equidistance line will have very little effect on the ultimate position of that line. Zone B is the area of variable distortion where the use of an island as a basepoint will have a significant distorting effect—of variable magnitude depending on the island's position on the axis of increasing distortion—on the equidistance line and also where the outer edge of the island's territorial sea does not cross that line at any point. Zone C is the area of major distortion where the territorial sea of an island intersects the median or lateral line. Zone D is the area of isolation where both the island and its territorial sea lie completely beyond the equidistance line.

(1). *Opposite States (Diagram II: Zones A-C)*

The ordinary situation with respect to most opposite states is that islands lying between those states are so small that they comprise an insubstantial portion of the territory of the state to which they belong. These islands should not be used as basepoints or otherwise given effect in continental shelf delimitation unless the concomitant distortion is insignificant, *i.e.*, the use of the island as a basepoint has only a very minor effect on the equidistance line calculated without reference to the island.

An island lying within the territorial sea of the state to which it belongs (Zone A) may be used as a basepoint for the calculation of a median line primarily because of its identification with the coast and its relatively minor effect on the ultimate location of that line. There are two types of insular configurations that are found within this zone and might qualify for such treatment.

First, a large number of islands which are so close together that they might be characterized as fringing the coast presents the strongest case for the use of the islands as basepoints, even if they do not qualify for such use under the *Fisheries* case.⁵² For example, islands fringing the Yugoslav coast were given full effect in the delimitation of the Adriatic Sea between Italy and Yugoslavia.⁵³ Islands were similarly treated in the

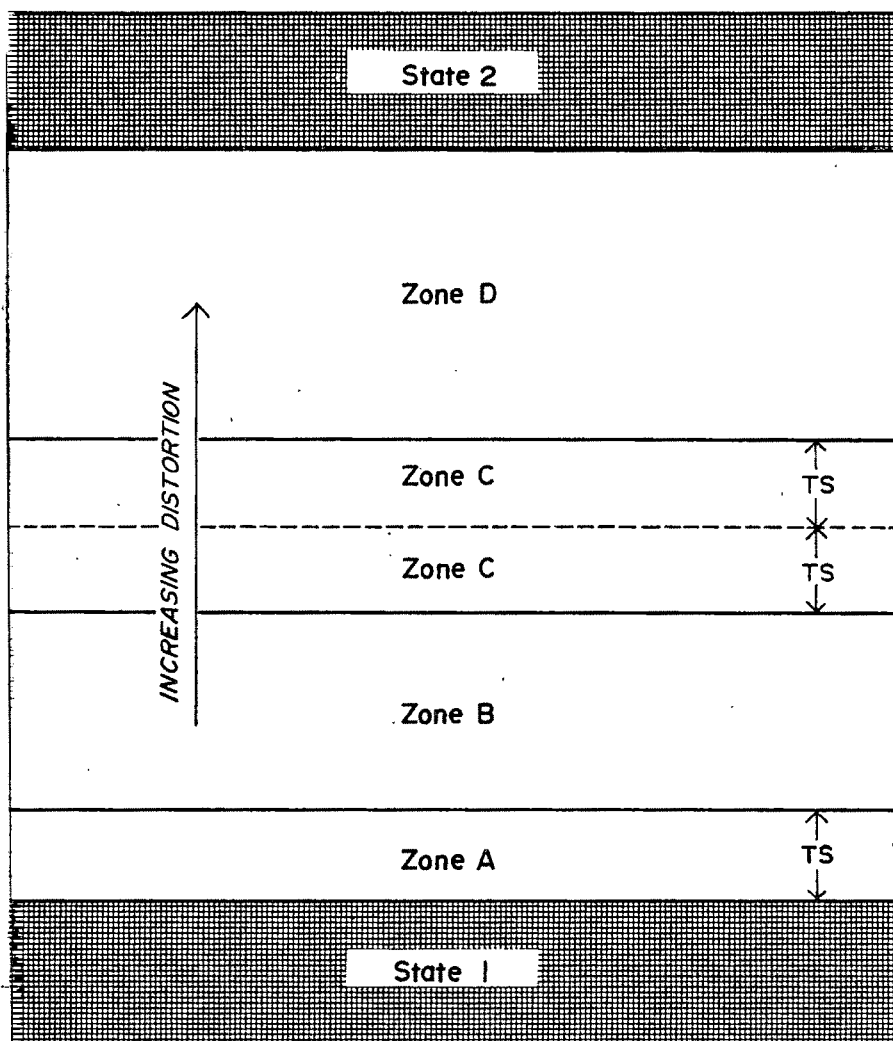
ond, the territorial seas of States 1 and 2 are assumed to be equal in width though this will not always be the case. The existence of territorial seas of differing widths would complicate the diagrammatic presentation but would not affect the analysis or the basic conclusions drawn from that analysis. Third, the distance between States 1 and 2 in Diagram II is assumed to be 400 miles or less and thus does not cover the "distant island" situation, *i.e.*, a delimitation involving only the island and not the mainland territory of the state to which the island belongs (*e.g.*, a delimitation between France and Canada involving the islands of St. Pierre and Miquelon). The extension of the model to the distant island problem is discussed in notes 76, 108, *infra*.

⁵² [1951] ICJ REP. 116. See note 19, *supra*.

⁵³ *Continental Shelf Boundary: Italy-Yugoslavia*, LIMITS IN THE SEA, *supra* note 11, No. 9 (Feb. 20, 1970), 7 ILM 547 (1968). The islands located along the Italian coast, not nearly as numerous nor as easily characterized as fringing that coast, were not accorded similar treatment.

DIAGRAM II

The Zones of Distortion—Opposite States



TS = The territorial sea or a band of maritime space of equivalent width.

— = The median line between States 1 and 2 drawn without reference to to any islands belonging to either State.

Delimitation of the Gulf of Finland between Finland and the Soviet Union⁵⁴ and in the delimitation of the Eastern Persian Gulf between Iran

⁵⁴ Agreement between the Government of the Republic of Finland and the Government of the Union of Soviet Socialist Republics concerning the boundaries of sea areas and of the continental shelf in the Gulf of Finland, UNLS/15, *supra* note 19, at 758, Continental Shelf Boundary: Finland-Soviet Union, LIMITS IN THE SEA, *supra* note —, No. 16 (May 25, 1970).

and Oman.⁵⁵ In each of these cases the islands were numerous and were located very near other islands and the mainland coast.

A second situation occurs when there is only one island or a few islands which are located near the coast and within the territorial sea of the mainland state. This situation is theoretically distinct from the first in that the macrogeographical relation of the island or islands to one another and the mainland coast is lessened somewhat and hence the justification for giving any effect to these islands is not strong. However, it must be remembered that, by hypothesis, these islands produce only minor distortion. The deciding factors in the decision as to whether these islands are to be ignored⁵⁶ or taken into account⁵⁷ are convenience and the possibility of reciprocal treatment. For example, in the mid-Persian Gulf delimitation between Bahrain and Iran, all points on the median line were measured from an islet north of al-Muharrag (Bahrain) and from the islet of Nakhilu (Iran).⁵⁸ These two islets provided convenient basepoints for the delimitation because both are approximately the same distance from the mainland coasts of their respective states, thus negating the possibility of any significant median line distortion.

An island in Zone B has several characteristics worth noting. First, it lies outside of the territorial sea of the mainland state to which it belongs, which would normally deprive the island of macrogeographical identification with that state. Second, the island is at least the width of a territorial sea away from the median line, and thus the allocation of a territorial sea to the island requires no modification of that line. Third, the use of the island as a basepoint would cause a significant distortion of the median line.

The combination of these factors dictates that an island in this zone should not be used as a basepoint and should not be given any significant effect in the areal division of maritime space, other than the allocation of its territorial sea. For example, in the delimitation of the Adriatic Sea between Italy and Yugoslavia, two small Yugoslav islands (Jubuka and Andrija), situated in what would be the middle of Zone B, were given only slight, if any, effect in the determination of the continental shelf boundary.⁵⁹

⁵⁵ *Continental Shelf Boundary: Oman-Iran*, *id.* No. 67 (Jan. 1, 1976), 14 ILM 1478 (1975).

Oman had previously declared its intention to use straight baselines between its off-shore islands. *Straight Baselines: Oman*, LIMITS IN THE SEA, *supra* note 11, No. 61 (June 4, 1975), UNLS/16, *supra* note 36, at 23.

⁵⁶ See, e.g., *Agreement concerning the boundary line dividing the continental shelf between Iran and Qatar*, UNLS/16, *supra* note 36, at 416; *Continental Shelf Boundary: Iran-Qatar*, LIMITS IN THE SEA, *supra* note 11, No. 25 (July 9, 1970); *Agreement between Sweden and Norway concerning the delimitation of the continental shelf*, *supra* note 36.

⁵⁷ See, e.g., *Continental Shelf Boundary: Bahrain-Iran*, LIMITS IN THE SEA, *supra* note 11, No. 58 (Sept. 13, 1974).

⁵⁸ *Id.*

⁵⁹ *Continental Shelf Boundary: Italy-Yugoslavia*, *supra* note 53. See also *Continental Shelf Boundary: Iran-United Arab Emirates (Dubai)*, LIMITS IN THE SEA, *supra* note 11, No. 63 (Sept. 30, 1975) (note that four islands whose territorial seas did not cross

It is again important to recall the *caveat* that an island, even though located outside of the territorial sea, may have very little distorting effect on the median line because of the presence of an island or islands owned by the opposite state in a similar position. In fact, an island may serve as a convenient basepoint. For example, in the delimitation of the northeastern Baltic Sea between Finland and the Soviet Union,⁶⁰ a small unnamed Finnish islet⁶¹ was used as a basepoint, since the reciprocal use of the larger Soviet island of Hiiumaa negated the possibility of a significantly distorted boundary line.⁶²

An island in Zone C is characterized by the fact that it will normally lack a macrogeographical relation to the state to which it belongs because of its distance from that state and also because the allocation of a territorial sea to the island would require a modification of the median line. Further, the use of the island as a basepoint would obviously cause a major distortion of that line. Accordingly, an island located in Zone C is entitled only to a territorial sea and is not to be used as a basepoint or given any other significant effect in a delimitation. Whether or not a state is entitled to be areally compensated for the continental shelf area displaced by the allocation of the island's territorial sea will depend on the surrounding circumstances.

If both states have an island on or near the median line, each island could be given a territorial sea and the areas displaced by these median line modifications would, in most instances, cancel each other out. This situation occurred in the Persian Gulf delimitation between Saudi Arabia and Iran.⁶³ The two islands of al-'Arabiyyah (Saudi Arabia) and Farsi (Iran) were each given a territorial sea, and, where those areas overlapped, a local median line was used for separation.⁶⁴ Thus the islands were given effect only in so far as it was necessary to insure their rights to a territorial sea.

The median line were not given any effect (Forūr, Banī Forūr, Banī Tanb, and Tanb-e Brzorg)).

However, there is always the possibility that a median line may be adjusted to reflect a mutual judgment as to the historic or economic significance of an island. Thus, the Iranian island of Kharg, located just outside of Iran's territorial sea, was given partial effect in the delimitation of the western Persian Gulf between Saudi Arabia and Iran. *Continental Shelf Boundary: Saudi Arabia-Iran*, LIMITS IN THE SEA, *supra* No. 21 (undated), 696 UNTS 189 (1968). This unusual treatment would seem to be attributable to Kharg's proximity to the coast, its importance to the development of Iran's offshore oil industry, and the historical patterns of oil exploration and recovery in the Persian Gulf.

⁶⁰ *Agreement between the Government of the Republic of Finland and the Government of the Union of Soviet Socialist Republics concerning the boundary of the continental shelf in the Northeastern part of the Baltic Sea*, UNLS/15, *supra* note 19, at 751; *Continental Shelf Boundary (Northeastern Baltic Sea): Finland-Soviet Union*, LIMITS IN THE SEA, *supra* note 11, No. 56 (Oct. 19, 1973).

⁶¹ The islet was one of many Finnish islands located beyond the Finnish territorial sea.

⁶² See also *Continental Shelf Boundary: India-Indonesia*, LIMITS IN THE SEA, *supra* note 11, No. 62 (Aug. 25, 1975).

⁶³ *Continental Shelf Boundary: Saudi Arabia-Iran*, *supra* note 59.

⁶⁴ *Id.*

Of course the presence of islands belonging to both states in Zone C is a rare occurrence. It is much more likely that the islands located in that zone will belong to only one of the delimiting states. In this case, agreement will depend on the inclination of the geographically advantaged state to make concessions. For example, in the delimitation of the Adriatic Sea between Italy and Yugoslavia,⁶⁵ Italy allowed two Yugoslav islands (Pelagruz and Kajola) a twelve-mile zone. In return, the median line was adjusted in Italy's favor in the northern and southern ends of the Adriatic. Similar median line modifications were made for the Iranian island of Sirri in the Persian Gulf delimitation between Iran and the United Arab Emirates.⁶⁶

In many situations the width of the waters between the delimiting states does not permit the existence of all three zones depicted in Diagram II. The absence of Zone B creates no new problems under the analysis proposed above. The real difficulties arise when Zone A and Zone C overlap, i.e., when an island is located in or very near the territorial sea of the state to which it belongs but the allocation of a territorial sea to the island would cause some displacement of the continental shelf area *and territorial sea* of the opposite state.

Most states in this situation would probably prefer an allocation of maritime space somewhat smaller than a territorial sea to the island in question. For example, in the straits between Bahrain and Saudi Arabia, the west coast of the Bahraini island of al-Saghirah and the east coast of the Saudi Arabian island of al-Kabirah were used as points on the boundary line.⁶⁷ Similar treatment has been accorded islands in the delimitation of the territorial sea⁶⁸ and, in fact, it seems more appropriate to carry out delimitations involving only a narrow strip of continental shelf beyond the territorial sea under the principles governing territorial sea delimitations.⁶⁹

(2) *Adjacent States (Diagram III: Zones A-C)*

The agreements concluded by adjacent states, though relatively few in number, do reinforce and parallel the general framework proposed above

⁶⁵ *Continental Shelf Boundary: Italy-Yugoslavia*, *supra* note 53.

⁶⁶ *Continental Shelf Boundary: Iran-United Arab Emirates (Dubai)*, *supra* note 59. See also *Bahrain-Saudi Arabia boundary agreement*, *supra* note 44 (note the treatment of the island of Kaskus (Saudi Arabia) and Khor Fasht (Bahrain) at point 10 of the boundary line and the treatment of Kaskus and Fasht al Jarim (Bahrain) at point 11).

⁶⁷ *Bahrain-Saudi Arabia boundary agreement*, *supra* note 44 (the boundary line, though not truly equidistant, does effect an approximately equal division of the maritime area between the states).

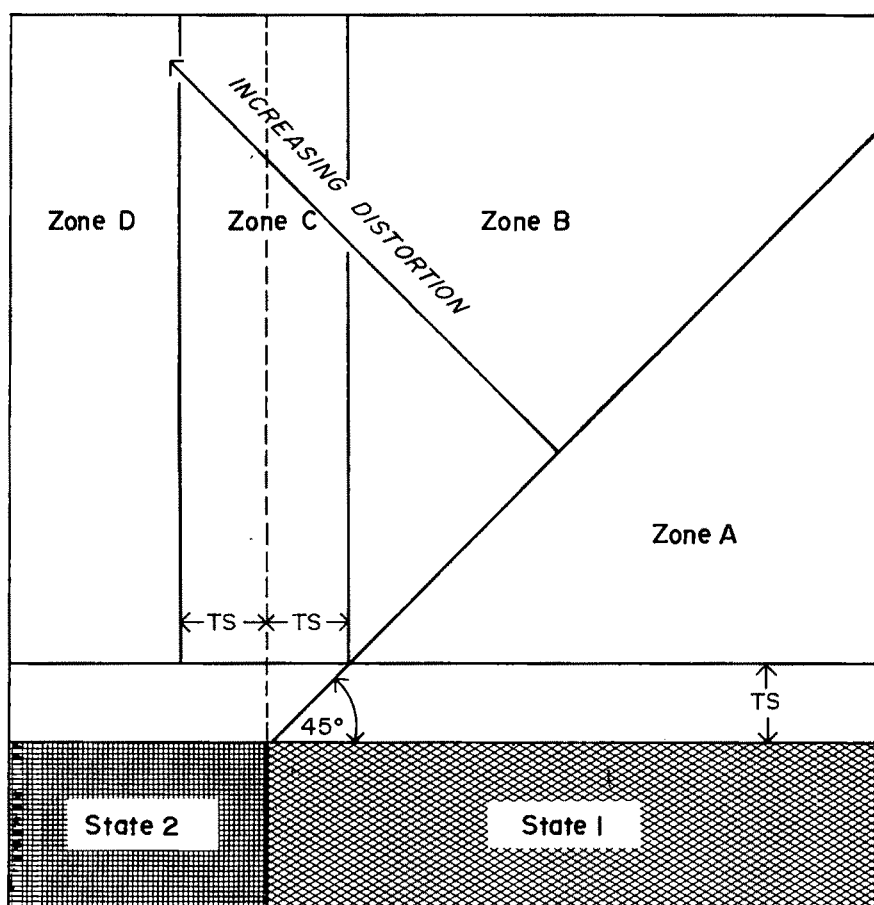
This treatment is not nearly so radical as one respected commentator's suggestion that the median line cut through islands in its path. See Boggs, *Delimitation of Seaward Areas under National Jurisdiction*, 45 AJIL 240, 257-59 (1951).

⁶⁸ See, e.g., *Territorial Sea Boundary: Canada-St. Pierre and Miquelon*, LIMITS IN THE SEA, *supra* note 11, No. 57 (Sept. 12, 1974).

⁶⁹ See note 37, *supra*. See also *Historic Water Boundary: India-Sri Lanka*, LIMITS IN THE SEA, *supra* note 11, No. 66 (Dec. 12, 1975), 13 ILM 1442 (1974), 16 INDIAN J. INT. L. 126 (1976) (note the treatment of the island of Kachchativu whose ownership was previously in dispute).



DIAGRAM III
The Zones of Distortion—Adjacent States



TS = The territorial sea or a band of maritime space of equivalent width.
 --- = The lateral boundary line between States 1 and 2 drawn without reference to any islands belonging to either State.

for opposite states.⁷⁰ The somewhat different arrangement of zones is illustrated in Diagram III which is so constructed that an island located in Zone A will have no distorting effect on the lateral line when and if the island is used as a basepoint.

In Zone B, the magnitude of the lateral line distortion created by the use of an island as a basepoint will depend on the island's distance from the coast and its proximity to the lateral line. An island located in this zone should not be used as a basepoint nor should it be given any other

⁷⁰ The state practice in delimitations between adjacent states is sparse and hence the predominance of the equidistance method as the preferred mode of delimitation is not so clearly established as in the case of opposite states. See notes 36-39, *supra*, and accompanying text. Further, delimitations between adjacent states present different and often more difficult problems. See [1969] ICJ REP. 3, 36-37.

effect in a delimitation other than the allocation of its territorial sea. For example, two small Soviet islets which could have produced considerable distortion were ignored in the delimitation of the Barents Sea between Norway and the Soviet Union.⁷¹

It should again be apparent that an island may serve as a convenient basepoint for the measurement of maritime zones. Thus in the Baltic Sea delimitation between Poland and the German Democratic Republic,⁷² the German island of Greifswalder Oie was used as a basepoint for several lateral line segments. Although substantial adjustments were made to the lateral line in the vicinity of the coast, they probably were intended to compensate for the somewhat concave coastline rather than for the use of the island.

In Zone C, an island should not be used as a basepoint or given any other effect unless it lies within the territorial sea of the state to which it belongs.⁷³ If the island lies outside of that territorial sea, it is entitled to a territorial sea of its own even though the allocation of this territorial sea will require modification of the lateral line. For example, in the Persian Gulf delimitation between Abu Dhabi and Qatar,⁷⁴ the lateral line took a semicircular route around the Abu Dhabi island of Daiyana.⁷⁵

(3) *The Zones of Isolation (Diagrams II and III: Zone D)*

An island located in Zone D of Diagrams II and III is characterized by the fact that its territorial sea is beyond the median or lateral line and does not intersect that line at any point.⁷⁶ When the principles discussed

⁷¹ *Continental Shelf Boundary: Norway-Soviet Union, LIMITS IN THE SEA*, *supra* note 11, No. 17 (May 27, 1970) (the boundary is not truly equidistant and apparently ignores a Norwegian straight baseline drawn across a local fiord). It is unclear whether two larger Soviet islands (Ostrov Kheynya-Saari and O Piena-Kheynya-Saari) were given any effect although their inclusion would not have appreciably affected the ultimate boundary since both islands were in a position comparable to the dividing line between Zones A and B in Diagram III. See also *Agreement between Sweden and Norway concerning the delimitation of the continental shelf*, *supra* note 36.

⁷² *Continental Shelf Boundary: German Democratic Republic-Poland, LIMITS IN THE SEA*, *supra* note 11, No. 65 (Nov. 28, 1975).

⁷³ Such treatment is evident in the delimitation between the United States and Mexico, Treaty to resolve pending boundary differences and maintain the Rio Grande and Colorado River as the international boundary between the United States of America and the United Mexican States, *done* Nov. 23, 1970, 23 UST 371, TIAS No. 7313 (effective April 18, 1972), *Maritime Boundary: Mexico-United States, LIMITS IN THE SEA*, *supra* note 11, No. 45 (Aug. 11, 1972).

⁷⁴ *Agreement on settlement of maritime boundary lines and sovereign rights over islands between Qatar and Abu Dhabi*, UNLS/16, *supra* note 36, at 403, *Continental Shelf Boundary: Abu Dhabi-Qatar, LIMITS IN THE SEA*, *supra* note 11, No. 18 (May 29, 1970).

⁷⁵ *Id.* Qatar received no areal compensation for the area displaced by the allocation of the territorial sea. This result may be due to the fact that Daiyana had been the subject of a territorial dispute between the two states and also to the fact that Abu Dhabi claimed only a three-mile territorial sea.

⁷⁶ It must be remembered that the model deals only with the case where delimitations between states are affected by the presence of islands belonging to one or more

above are applied to this situation, the island is allocated a territorial sea only. Thus, in one sense, it is isolated, as this territorial sea is not contiguous with the continental shelf area of the state to which the island belongs.⁷⁷

Of course, if the island is not too far from the equidistance line, the line could be adjusted in a manner similar to the accommodations made for islands which are astride the line. For example, a passage twelve miles in width could be used to connect the island's territorial sea with the maritime zones of the coastal state.⁷⁸ However, this treatment is not feasible when the island is located so far from the median or lateral line that the attribution of any additional maritime space beyond the territorial sea, even if only on one side of the island, would greatly diminish the continental shelf areas of the other delimiting states. It is this geographical situation which underlies many of the current controversies about delimitation and which necessitates the consideration of several additional factors in conjunction with the general analytic framework proposed above.⁷⁹

C. REFINEMENT OF THE MODEL

The model as formulated thus far provides a general "equitable" framework for most delimitations involving islands. However, some islands have such significance that the allocation of a territorial sea alone, without additional rights in the maritime space beyond that area, would constitute inequitable treatment. In order to avoid such a result, it is necessary to recognize the two principal situations where a departure from the general framework might be justified.

First, an island which constitutes a *substantial* portion of a state's territory should be given some effect in the delimitation of maritime areas above

of the states, a situation distinguishable from the "distant island" case where a state's involvement in a delimitation is due *solely* to the presence of one or more of its islands in a continental shelf area sought to be delimited by one or more other states. See note 51, *supra*. The distant island presents some difficult problems and for both theoretical and practical reasons, it is best treated under the refined version or secondary phase of the model. See note 108, *infra*.

⁷⁷ This will not be the case where the island or islands (e.g., Aleutians) lie in Zone D and one or more other zones.

⁷⁸ See HODGSON, *supra* note 11, at 43 (suggested treatment for rocks).

⁷⁹ The relative unimportance of an island to the state to which it belongs coupled with the delimiting states' desire to reach an agreement, see note 35, *supra*, have produced some rather interesting delimitations in the Zone D situation. It is not uncommon for a state to relinquish control over small uninhabited islands which would lie in the maritime territory of another state as determined by the principle of equidistance. See, e.g., *Agreement on settlement of maritime boundary lines and sovereign rights between Qatar and Abu Dhabi*, *supra* note 74. Indeed, the desire to delimit a given area may provide an incentive for the settlement of disputes over the ownership of islands. See *Historic Water Boundary: India-Sri Lanka*, *supra* note 69.

In the continental shelf delimitation between Argentina and Uruguay, the Argentinian island of Martin Garcia was located on the Uruguayan side of the agreed boundary line. *Continental Shelf Boundary: Argentina-Uruguay*, *supra* note 37. The island was not accorded a territorial sea and instead, it was agreed that Martin Garcia would remain Argentinian territory to be used *only* as a wildlife refuge. *Id.* (Arts. 44 and 45).

and beyond the allocation of a territorial sea. This does not mean that the island is to be used as a basepoint since such treatment would still produce a distorted and disproportionate delimitation in most instances.⁸⁰ Rather, a method must be devised which allocates maritime space to the island in a manner such that the interests of all the delimiting states are taken into account.

In the *North Sea* cases, the Court stated that a delimitation according to equitable principles should bring about a "reasonable degree of proportionality" between the extent of the continental shelf areas appertaining to a coastal state and the length of the state's coast.⁸¹ This approach is readily adaptable to the continental shelf of islands. In fact, the "proportionality of coastline" criterion provides both a basis for determining which islands are "substantial" and an appropriate measure of the effect to be given these substantial islands.

Because the standard is one of proportionality, the important factor is not the absolute size of an island but rather its relative size with respect to the delimiting states.⁸² The measure of an island's "size" for the purpose of delimitation is not two-dimensional (area) but rather, as in the *North Sea* cases, one-dimensional—the length of the coastline of the island.⁸³ Since the coastline for this purpose should be "measured in the general direction"⁸⁴ of the coast, the maximum length⁸⁵ of an island would be an appropriate measure of the length of the island's coastline for the purpose of delimitation.⁸⁶ This length should then be compared to the length of the state's coastline as a whole. Only if it constitutes a certain percent (*e.g.*, more than 25%) of the total coastline should the island be classified as "substantial."⁸⁷ The magnitude of the effect is to be determined by comparing the insular⁸⁸ and mainland coastline of the one state to that

⁸⁰ See Diagram I, *supra*.

⁸¹ [1969] ICJ REP. 3, 54.

⁸² Absolute size will be relevant in determining whether a very large island (*e.g.*, New Guinea, Ireland) should be initially regarded as an island or as mainland for the purpose of delimitation.

⁸³ See [1969] ICJ REP. 3, 54; compare Ely, *supra* note 34, at 233–35.

⁸⁴ [1969] ICJ REP. 3, 54.

⁸⁵ That is, the distance between the two points on an island's coastline which are farthest from each other. In the case of a regularly shaped (roughly circular) island, this distance would be equivalent to the island's maximum diameter.

⁸⁶ The choice is functionally justifiable in that it constitutes an approximate measure of the amount of coastline which would be of operative significance in a seaward delimitation, *i.e.*, the amount of coastline that borders the area to be delimited. If the mainland coastlines were very regular, such as those depicted in Diagrams II and III, *supra*, a more exact measure would be the maximum length of the island parallel to the coasts of opposite states or perpendicular to the coasts of adjacent states.

⁸⁷ Normally, the determination as to whether the islands belonging to a state are substantial should be made with respect to each island individually. In rare instances where there is a close geographical relation among a number of islands, it may be appropriate to aggregate the islands for the purpose of determining whether the group as a whole is substantial. However, in that situation, it is more appropriate to use the maximum length of the group as a whole rather than adding the lengths of the individual islands.

⁸⁸ The "insular coastline" is composed of the maximum lengths of all the islands

of the other states involved in the delimitation and then dividing the maritime area in proportion to the coastline ratios.⁸⁹ The application of the proportionality test as herein formulated will be illustrated in Part III of this article.

A second situation that must be recognized in any model of delimitation is the existence of historic rights which an island's inhabitants may have acquired in the waters beyond the island's territorial sea.⁹⁰ These rights will most often be claimed in connection with the resources of the exclusive economic zone, but they nonetheless can have an effect on the delimitation of the continental shelf because it will normally be infeasible to delimit that area and the exclusive economic zone differently. These rights must be preserved under any scheme of delimitation which purports to be based on equitable principles.

which have been determined to be substantial. See note 87, *supra*. Normally, there should only be one or two such islands but this of course depends on the percent chosen as the "substantiality" cutoff.

⁸⁹ An important attribute of this test is that it is, to a degree, self-correcting. In other words, the actual political choice of a cutoff percent, above which all islands would be deemed substantial, is not critical. I have chosen 25% only as an example, though a choice below 5% would, in my estimation, be well within the realm of insubstantiality.

For example, assume that State X, which is comprised of an island with a coastline of length X_1 and mainland territory with a coastline of length X_2 , is involved in a delimitation with State Y which has a total coastline of Y_1 . The ratio X_1/X_2 will be compared to the cutoff percent to determine whether X_1 is to be regarded as substantial. However, if State X should take the position that the cutoff percent should be less than X_1/X_2 , in effect classifying X_1 as substantial, the utility of the test is not destroyed.

This is so because State X's proportional share of the area to be delimited will be equal to the ratio:

$$\frac{\text{Total Coastline of X}}{\text{Total Coastline of X and Y}} = \frac{X_1 + X_2}{X_1 + X_2 + Y_1} = \frac{1 + X_1/X_2}{1 + \frac{X_1}{X_2} + \frac{Y_1}{X_2}}$$

As the cutoff percent is lowered to include X_1 , X_1/X_2 becomes smaller and the limit of the above ratio tends to:

$$\frac{1}{1 + \frac{Y_1}{X_2}} = \frac{X_2}{X_2 + Y_1} = \frac{\text{Mainland Coastline of X}}{\text{Total Mainland Coastline of X and Y}}$$

and the so-called "substantial" islands are given very little effect in the overall allocation of continental shelf areas.

⁹⁰ This assumes, for the sake of argument, that it is indeed possible to acquire historic rights in the areas located beyond the territorial sea, an admittedly controversial proposition.

The concept of historic rights was originally confined to bays. See M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 358-68 (1962). However, it recently has been the subject of expansive interpretations by both the International Law Commission and some states. See *Juridical Regime of Historic Waters, including Historic Bays*, [1962] 2 Y. B. INT. L. COMM. 1, UN Doc A/CN. 41/Ser. A/1962; Harben, *Soviet Attitudes and Practices Concerning Maritime Waters: A Recent Historical Survey*, 15 JAG J. 149 (1961).

For the remainder of this article, a reference to historic rights will include all rights, historic or otherwise, which are recognized by the states delimiting the maritime area in question.

By their very nature, historic rights are not amenable to a generalized or mathematical treatment. Each case must necessarily be analyzed on its own merits. However, one possible measure that should always be considered is the establishment of joint resource utilization zones similar to the joint exploitation zones created by some of the bilateral agreements on continental shelf delimitation.⁹¹ The creation of zones of joint jurisdiction for a specified purpose was one of the solutions to the problem of overlapping continental shelves offered by the Court in the *North Sea* cases⁹² and would seem particularly appropriate when the inhabitants of an island belonging to one state have acquired historic rights in waters which, under the model, would come under the jurisdiction of another state.

III.

THE APPLICATION OF THE MODEL

The model as developed thus far provides a framework for analyzing delimitation problems complicated by the presence of islands. The primary stage of analysis concentrates on an island's location with respect to other islands and the mainland states and is conducted under the assumption that an island is not to be used as a basepoint or to be given any other effect in a delimitation unless such treatment is dictated by convenience or the need to insure the existence of that island's territorial sea. The secondary stage of analysis merely recognizes the fact that islands of relatively large size are and should be entitled to a proportionate effect in the delimitation of the continental shelf. Finally, the existence of historic rights must always be considered as a possible subjective complication to this approach. This model will now be applied to several actual cases where the presence of islands is an obstacle to the delimitation of a continental shelf area.⁹³

There are many situations where the presence of islands complicates the process of delimitation between opposite states. One very good example exists in the Mediterranean Sea between Italy and Tunisia.⁹⁴ Four quite small Italian islands—Lampedusa, Pantelleria, Lampione, and Linosa⁹⁵—lie closer to Tunisia than to Sicily.⁹⁶ The situation is further complicated by the presence of the insular state of Malta. (See Map I).

⁹¹ See, e.g., *Bahrain-Saudi Arabia boundary agreement*, *supra* note 44 (Fashtu bu Saafu Hexagon); *Agreement on settlement of maritime boundary lines and sovereign rights over islands between Qatar and Abu Dhabi*, *supra* note 74; *Agreement between Sudan and Saudi Arabia relating to the joint exploitation of the natural resources of the sea-bed and sub-soil of the Red Sea in the Common Zone*, UNLS/18, *supra* note 36, at 452.

⁹² [1969] ICJ REP. 3, 53.

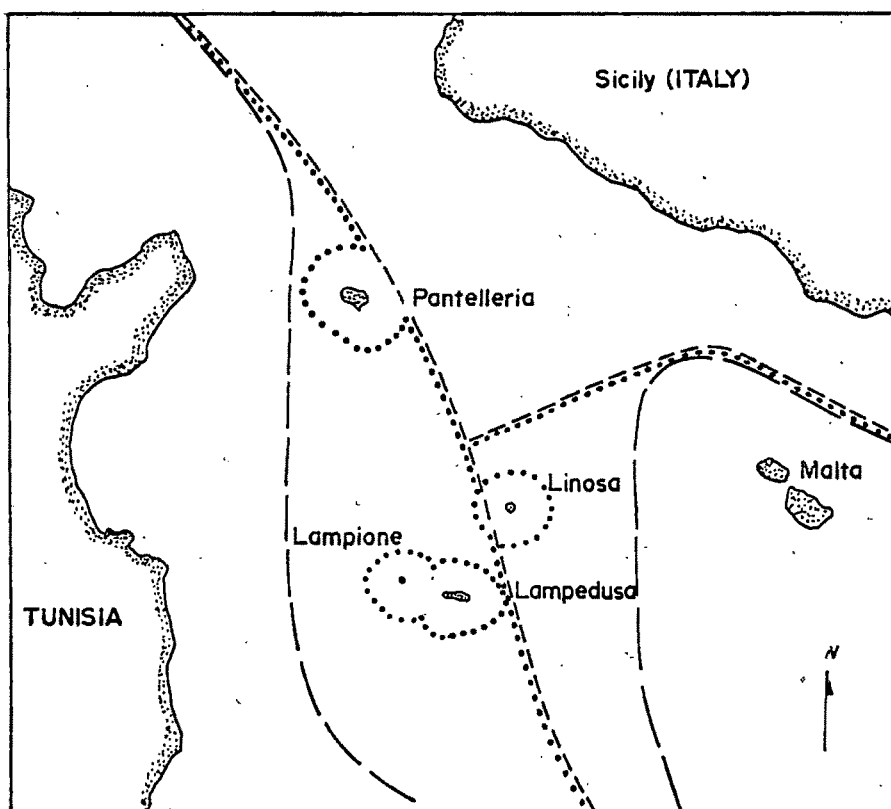
⁹³ Only the application of the primary and secondary phases of the model are discussed in this section.

⁹⁴ Italy and Tunisia have signed an agreement delimiting this area which is very similar in some respects to the solution proposed by this article. The agreement has been ratified by Tunisia and awaits ratification by Italy.

⁹⁵ Lampedusa and Lampione actually lie on the Tunisian continental shelf as defined by the 200-metre isobath.

⁹⁶ Due primarily to its large absolute size, *see* note 82, *supra*, and secondarily to its proximity to the Italian mainland and obvious macrogeographical relation to that mainland, Sicily will be treated as mainland.

MAP I
Proposed Delimitation: Italy-Tunisia-Malta



- = The equidistance line drawn without any reference to islands.
- = The equidistance line drawn using the islands as basepoints.
- = The boundary line suggested by the model.

A comparison of the hypothetical boundaries drawn with and without reference to the islands demonstrates that the use of the islands as basepoints would certainly have a "disproportionately distorting effect"⁹⁷ on the delimitation. Given the relatively small size of these islands, the situation seems quite amenable to treatment under the primary phase of the model, which dictates that each island is entitled only to a territorial sea and is not to be given any other effect in the delimitation.

Pantelleria lies slightly across the median line (Zone C) and thus it is possible to modify that line in the vicinity of the island in order to give the island a twelve-mile territorial sea which is contiguous to Italy's continental shelf, as determined by the equidistance method. To compensate for this modification, the median line could be altered in Tunisia's favor in the northern part of the Sicilian Channel.⁹⁸

⁹⁷ [1969] ICJ REP. 3, 36.

⁹⁸ This treatment is similar to that accorded the middle Yugoslav islands in the delimitation of the Adriatic Sea between Italy and Yugoslavia. See *Continental Shelf Boundary: Italy-Yugoslavia*, *supra* note 53.

take the form of slaps or blows of the hand on the head or face.”⁵² The Commission considered that whether this was cruel or excessive could differ between different societies or even between different sections of them.⁵³

One crucial question concerning Article 3 which was raised by the use of the word “unjustifiable” in the *Greek* case and by the approach of the majority in the Parker Report was whether the prohibition in Article 3 was absolute or whether there were circumstances in which treatment contrary to Article 3 could be justified. The Commission, emphasizing the fact that Article 3 is a right from which there can be no derogation and which has its counterpart in Common Article 3 of the Geneva Conventions of 1949,⁵⁴ declared that acts in breach of Article 3 can never be justified under the Convention or under international law.⁵⁵ The prohibition was total.

This elucidation of the meaning of torture and inhuman and degrading treatment is similar to the definition contained in Article 1 of the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵⁶ One small difference, noted by Commissioner Ermacora in a Separate Opinion, was that in Article 1 torture is an aggravated form of *both* inhuman and degrading treatment.⁵⁷ In practice this distinction could make little difference, since an aggravated form of degrading treatment would also be inhuman treatment and, if its purpose were to obtain information or to punish, it could also be torture.

The absolute nature of the guarantee, especially in times of emergency, is directly contrary to the relative approach adopted by the majority of the Parker Committee. It is reflected unambiguously in Article 3 of the UN Declaration, which states:

No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.⁵⁸

By its elimination of the doubt, caused by the use of the word “unjustifi-

⁵² ECHR GREEK REP., *supra* note 40, at 501, quoted in ECHR REP., *supra* note 1, at 377.

⁵³ *Id.*

⁵⁴ *Supra* note 14.

⁵⁵ ECHR REP., *supra* note 1, at 379.

⁵⁶ G.A. Res. 3452. 30 GAOR, Supp. (No. 34) 91, UN Doc. A/10034 (1975). Article 1 of the Declaration states:

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

⁵⁷ See ECHR REP., *supra* note 1, 497. For further discussion on the legal problem of defining torture, see AMNESTY INTERNATIONAL, REPORT ON TORTURE, *supra* note 10, at 29-35.

⁵⁸ *Supra* note 56.

Convention? Had other persons in custody in the autumn of 1971 and early 1972 been subjected by the security forces to torture or inhuman or degrading treatment or punishment within the meaning of Article 3 and, if so, did such treatment constitute an administrative practice in breach of that provision?

The Commission first considered the meaning of Article 3, noting the following distinctions between torture, inhuman treatment, and degrading treatment which had been drawn in the *Greek* case.

(1) Considering the notions of "torture," "inhuman treatment," and "degrading treatment" in relation to each other, "all torture must be inhuman and degrading treatment and inhuman treatment also degrading."⁴⁷

(2) Inhuman treatment covers "at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable."⁴⁸

(3) Torture connotes inhuman treatment "which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment."⁴⁹

(4) "Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience."⁵⁰

The Commission had made it clear in the *Greek* case that "the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault" constituted "nonphysical torture."⁵¹ These elements were distinguished from "a certain roughness of treatment" which "may

when the delegates requested, as they are entitled to under the Rules of Procedure, that the interrogation records be submitted to the Commission. The United Kingdom replied claiming Crown privilege on the basis that their disclosure would be detrimental to the public interest. The point was curiously not pursued by the Commission. *Id.* 240-41. See also Commissioner Mangan's Separate Opinion, *id.*, 492.

Finally the Irish Government objected to the disclosure by the United Kingdom of the transcript of evidence to its witnesses, arguing that this was a breach of the confidentiality of the proceedings. The United Kingdom responded that witnesses were shown relevant parts of the transcripts so that they would be in a position to deal with allegations made against them. The Commission accepted this point and took it into consideration in their assessment of the evidence. A similar decision was taken in relation to the Irish objection vis-à-vis the acceptance of anonymous affidavits. See *id.*, 237-41. For secrecy of Commission proceedings, see Article 33 of Convention. COLLECTED TEXTS *supra* note 31, at 303.

⁴⁶ Article 3 reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Castberg states that the understanding of Article 3 has become one of the most serious and important problems in practice in the application of the Convention, to a degree that would not originally have been expected. *Supra* note 31, at 87.

⁴⁷ ECHR REP., *supra* note 1, at 377 (quoting ECHR GREEK REP., *supra* note 40, at 186).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ ECHR GREEK REP., *supra* note 40, at 461, quoted in ECHR REP., *supra* note 1, at 377.

THE MERITS

In relation to the issues of internment and discrimination, the Commission in a unanimous opinion found for the United Kingdom.⁴⁴ Further it was held that Article 1 of the Convention could not be the subject of a separate breach. However, the Commission held that the five techniques constituted a practice of inhuman treatment and torture in violation of Article 3 of the Convention; that in eleven other cases inhuman treatment by the security forces, in breach of Article 3, had been proven; and that in the autumn of 1971 a practice of inhuman treatment in connection with the interrogation of prisoners by the RUC at Palace Barracks had been established. It remains to examine the arguments and reasons underlying the latter findings of the Commission.

ARTICLE 3: ANALYSIS AND INTERPRETATION ⁴⁵

Two main points were at issue under Article 3.⁴⁶ Did the employment of the five techniques constitute treatment in breach of Article 3 of the

⁴⁴ See ECHR REP., *supra* note 1, at 9-103 and 105-220.

⁴⁵ *Id.* 221-473.

More than 100 witnesses were heard by three delegates from the Commission. The Irish Government was asked to submit fifteen representative cases of ill treatment and a summary of the principal facts on which each witness should be heard. This was communicated to the U.K. Government which in turn was asked to propose witnesses and outline the nature of the evidence involved. Altogether six hearings of the delegation took place on Article 3 evidence between November 26, 1973 and March 1, 1975. The hearings and the reports from the delegates to the Commission were punctuated with disputes over various procedural issues, arising mostly out of security considerations. First, the United Kingdom objected to the hearing of its witnesses in Strasbourg on the ground that the Human Rights Building failed to meet their security requirements. The delegates and the Commission took the view, having regard to Article 28(a) of the Convention which obligated states to "furnish all necessary facilities," that it was up to the United Kingdom to provide an alternative venue. The issue was finally settled by an offer from the Norwegian Government to allow the use of the military air base at Sola, near Stavanger, for United Kingdom witnesses. See ECHR REP., *supra* note 1, at 234.

Second, the United Kingdom felt that, for security reasons, its witnesses should be visible only to the delegates and the Secretariat staff and that their identities should be withheld. The Commission felt that it was not inconsistent with security considerations to enable the Irish leading counsel to see the witnesses they were cross-examining and that they would take the nondisclosure of identity into consideration when assessing the value of the evidence given. On a similar point, the delegates had ruled that witnesses for the Irish Government were not to be asked if they were members of the IRA on the basis that this was irrelevant for Article 3 purposes, although the United Kingdom responded that it was relevant in assessing credibility. ECHR REP., *supra* note 1, at 234-38.

Third, the United Kingdom was not prepared for reasons of security to submit the proofs of evidence to the Irish delegation a week in advance, notwithstanding the difficulties that that posed for cross-examination of the witnesses. The Commission accepted the Irish objection and instructed that proofs be made available a week in advance. Notwithstanding this ruling the U.K. delegation continued the practice of sending proofs at short notice and argued that "this was a security matter upon which they themselves could be the only judges." *Id.* 239. Security was again paramount

It is clear from the interpretation of this article in the *Cyprus* case,³⁷ the *Lawless* case³⁸ and the *Greek* case,³⁹ that the Commission reserves to itself the right to make its own evaluation of whether the emergency is one which threatens "the life of the nation"⁴⁰ and whether the state is taking measures to the extent strictly required by the "exigencies of the situation." Furthermore, both the Commission and the Court are prepared to grant a certain latitude or margin of appreciation to a state that lodges a notice of derogation on the basis,

that the national authorities must *prima facie* have been in a better position, at the time and place concerned, to appreciate the circumstances than the Commission which nearly always has to regard the situation out of its original context.⁴¹

However, it must be noted from Article 15(2) that there can be no derogation from, *inter alia*, Article 3 dealing with freedom from torture and inhuman or degrading treatment.⁴²

Another important provision in an emergency context is Article 17 which, as the Court noted in the *Lawless* case, was designed to prevent the Convention from being exploited by those who sought a freedom to engage in activities at variance with the aims of the Convention. However, Article 17 does not deprive a terrorist group, for example, from invoking any of the rights in the Convention. Its application has been effectively confined by *Lawless* to Articles 9, 10, and 11 on the argument that to prevent exploitation of the Convention it is only necessary to debar claims based on rights which would especially facilitate deprivation of the freedom to engage in activities destructive of the rights of others.⁴³ Clearly any more sweeping interpretation would afford states the opportunity to treat terrorists without regard to international human rights standards.

³⁷ *Supra* note 33.

³⁸ *Lawless v. Ireland*, Application No. 322/57. For the Report of the Commission, see EUROPEAN COURT OF HUMAN RIGHTS, SER. B, PLEADINGS, ORAL ARGUMENTS AND DOCUMENTS, 1960-61, at 9. For the judgments of the Court, see 3 YEARBOOK 492 (1960) and 4 YEARBOOK 438 (1961).

³⁹ *Supra* note 33.

⁴⁰ In its report on the *Greek* case, the Commission stated that:

Such a public emergency may then be seen to have, in particular, the following characteristics: (1) It must be actual or imminent. (2) Its effects must involve the whole nation. (3) The continuance of the organized life of the community must be threatened. (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

12 YEARBOOK: THE GREEK CASE 72 (1969). The Commission's Report was published as a separate volume of the *Yearbook* and will hereinafter be cited as ECHR GREEK REP.

⁴¹ ECHR SECRETARIAT, *Human Rights and Their Limitations*, 4 CASE-LAW TOPICS 2 (1973). See also Morrison, *Margin of Appreciation in European Human Rights Law*, 4 HUMAN RIGHTS J. 263 (1971) and Opinion of Sir Humphrey Waldo in the *Lawless* case. Report of the Commission, *supra* note 38, at 114.

⁴² Other nonderogatable rights are Article 2 (right to life), Article 4 (freedom from slavery and forced labor), and Article 7 (freedom from retroactivity of the criminal law).

⁴³ 4 YEARBOOK 438, at 452 (1961).

and 53) and will, if necessary, afford just satisfaction to the injured party (Art. 50). The Committee of Ministers is entrusted with the responsibility of supervising execution of the judgment (Art. 52). If the case is not submitted to the Court, the Committee of Ministers shall decide by a majority of two-thirds whether there has been a violation and in an affirmative case indicate measures to be taken by the offending state. If satisfactory measures are not taken by the state concerned, the Committee shall "consider what effect shall be given to its original decision and shall publish the report" (Art. 32).

EUROPEAN HUMAN RIGHTS LAW AND STATES OF EMERGENCY

Situations of crisis caused by natural calamities or armed threats to the integrity of the state highlight the point that rights cannot be enjoyed absolutely and present a difficult dilemma for governments obligated to protect human rights, for in an emergency situation the duty of the state to protect its institutions and its citizenry will conflict with its obligations to guarantee specific rights. It is clear that, if the European Convention afforded no margin for states to suspend protection of certain rights in times of crisis, it would never have come into force.

The Convention allows states to impose limitations on rights in two ways. A state is permitted to restrict the enjoyment of specific rights when such action is necessary to protect some superior state interest, for example, public order or public health.³⁶ In addition, Article 15 provides for a general right of derogation in times of emergency:

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

³⁶ See Articles 8, 9, 10, and 11. The restrictive provision attaching to freedom of expression (Art. 10 (2)) is representative.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

See Jacobs, *The Restrictions on the Exercise of Rights and Freedoms Guaranteed by the European Convention on Human Rights: Their Evolution from 1950 to 1975*, in *FOURTH INTERNATIONAL COLLOQUY . . .*, *supra* note 31, Council of Europe Doc. H/Coll. (75) 5.

It also establishes the European Commission and the Court of Human Rights "to ensure the observance of the engagement undertaken by the High Contracting Parties" (Art. 19). The Convention provides for two types of complaints: first, an interstate complaint (Art. 24) brought by one state against another on the basis of a breach of obligations under the Convention³³ and second, a complaint brought by an individual (Art. 25) who claims to be a victim of a violation. This important individual right of petition can only be exercised against those states which have specifically accepted the competence of the Commission to hear individual cases by lodging a declaration to this effect with the Secretary-General of the Council of Europe (Art. 25).³⁴ Complaints go to the European Commission which first screens them to see if they are admissible under the terms of the Convention (Art. 27).³⁵ In accordance with Articles 26 and 27, the complainant must have exhausted his local remedies, the complaint must not be manifestly ill founded or incompatible with the provisions of the Convention or an abuse of the right of petition nor may it be substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation for settlement. Furthermore, the complainant must be a victim of a violation, and the complaint must concern a violation after the Convention came into force, of a right actually guaranteed by the Convention.

If the complaint is deemed admissible according to these criteria, the Commission undertakes the dual function of trying to arrange a friendly settlement between the parties "on the basis of respect for human rights" and of establishing the facts of the case (Art. 28). If no friendly settlement is obtained, the Commission is authorized to draw up a report of the case in which it states its opinion as to whether there has been a violation and to forward this to the Committee of Ministers of the Council of Europe and the state concerned (Art. 31). Before a three-month period after the communication of the report elapses, any of the following four parties can refer the matter for adjudication to the European Court of Human Rights (Art. 48): (a) the Commission; (b) a state whose national is alleged to be a victim; (c) an applicant state; or (d) the state against whom the complaint has been lodged.

A judgment of the Court is final and binding on the parties (Arts. 52

³³ There have been only five interstate cases so far: (i) Greece v. United Kingdom, Application Nos. 176/56 and 299/57, 2 YEARBOOK 182, 186 (1959) [hereinafter referred to as *Cyprus* case]; (ii) Austria v. Italy, Application No. 788/60, 4 YEARBOOK 116 (1961); (iii) Denmark *et al.* v. Greece, Application Nos. 3321, 3322, 3323, 3346/67, 11(2) YEARBOOK 690, 731 (1968) [hereinafter referred to as *Greek* case]; (iv) Ireland v. United Kingdom, *supra* note 30; (v) Cyprus v. Turkey, Applications Nos. 5310/71, and 5451/72, 18 YEARBOOK 82 (1975).

³⁴ As of January 1977, 7,740 individual cases had been filed; however only 142 of these were held to be admissible. [1976] ECHR, ANNUAL REV. 31 (1977).

³⁵ For a thorough analysis of the jurisprudence of admissibility under the Convention, see Danelius, *Conditions for Admissibility in the Jurisprudence of the European Commission of Human Rights*, 2 HUMAN RIGHTS J. 284 (1969).

(b) That detention and internment had been carried out with discrimination on the grounds of political opinion contrary to Article 14 of the Convention read in conjunction with Articles 5 and 6.²⁷

(c) That the administrative practice in violation of Articles 3, 5, 6, and 14 constituted a breach of Article 1 of the Convention.²⁸

(d) That the methods of treatment of persons in custody, in particular the methods of interrogation, constituted an administrative practice in breach of Article 3.²⁹

On October 1, 1972, having obtained written and oral observations from the parties, the European Commission on Human Rights declared the application admissible.³⁰ This article proposes to examine only the issues relating to the compatibility with the Convention of the interrogation methods previously described and the Commission's assessment of the validity of the arguments adduced by the Compton and Parker Committees. More specifically it intends to analyze the decision of the Commission in relation to the developing international law of torture, the concept of state responsibility under the Convention, the concept of administrative practice, and the duty to secure human rights under Article 1. However, to put the issues in focus it is necessary to examine briefly the machinery established by the Convention and the provisions that deal directly with the protection of human rights in an emergency situation.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Both the United Kingdom and Ireland are parties to the European Convention on Human Rights.³¹ Based on the Universal Declaration of Human Rights,³² the Convention contains an extensive list of rights to be guaranteed by the High Contracting Parties, including the rights to life, liberty, speech, assembly, association, family life, and correspondence, and freedom from torture and inhuman or degrading treatment (Arts. 2-14).

²⁷ *Id.* 105-220.

²⁸ *Id.* 475-85.

²⁹ *Id.* 221-475.

³⁰ Decision on Admissibility, Applications Nos. 5310/71 and 5452/72, 15 YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 76 (1972) [hereinafter cited as YEARBOOK]. Also in ECHR REP., *supra* note 1, Annex II, at 31.

³¹ For text of the Convention, see, COUNCIL OF EUROPE, COLLECTED TEXTS 1-19 (9th ed. 1974). The Convention has five protocols. *Id.* 19-51. For general works on the Convention, see J. E. S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1969); F. CASTBERG, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1974); F. G. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1975); A. H. ROBERTSON, *HUMAN RIGHTS IN EUROPE* (2d ed. 1977); A. KHOL, *ZWISCHEN STAAT UND WELSTAAT* (1969); F. MONCONDUIT, *LA COMMISSION EUROPEENNE DES DROITS DE L'HOMME* (1965); Teitgen, *The European Guarantee of Human Rights: A Political Assessment* in *FOURTH INTERNATIONAL COLLOQUY ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, Council of Europe Doc. H/Coll. (75) 1 (1975); Zanghi, *The Effectiveness and Efficiency of the Guarantees of Human Rights Enshrined in the European Convention on Human Rights*, in *id.*, Council of Europe Doc. H/Coll. (75) 6 (1975).

³² G.A. Res. 217A, UN Doc. A/810, at 71 (1948).

them counterproductive and that this circumstance called into question the value of any supposed gains. He concluded:

The blame for this sorry story, if blame there be, must lie with those who, many years ago, decided that in emergency conditions in Colonial-type situations we should abandon our legal, well-tried and highly successful wartime interrogation methods and replace them by procedures which were secret, illegal, not morally justifiable . . .²²

The Report was published on March 2, 1972, and on the same day the then Prime Minister, Mr. Edward Heath, announced that the use of the five techniques would be discontinued.²³

Both the Compton and the Parker Reports were concerned with the five techniques which had been used on specially selected individuals. However, by the end of 1971, and in the early months of 1972, there was a steady stream of complaints relating to ill treatment of a less systematic or scientific nature. Between August 1971 and June 1972, 3,276 prisoners were processed at police holding centers throughout the province. About 2,000 of these passed through Palace Barracks, Holywood.²⁴ Between April 1971 and November 1974, more than one thousand complaints alleging ill treatment or assault by the RUC were received by the investigation department set up under the Police Act (N.I.) 1970 to investigate complaints against police officers. During that period there were 23 prosecutions against police officers for assault, 6 of which resulted in conviction. Figures up to April 1975 show 27 prosecutions; six convictions led only to fines and, in one case, a conditional discharge. Between March 31, 1972, and November 30, 1974, 1,078 cases of assault, allegedly committed by army personnel, were submitted to the Director of Public Prosecutions.²⁵

The Irish Government was concerned at the use of internment and perturbed by the approach of the Compton Committee to the interrogation methods. While the Parker Committee was deliberating, the government took the decision to challenge the exercise of the emergency power of internment and, in particular, the legitimacy in international law of the five techniques and other methods of interrogation under the European Convention on Human Rights.

More specifically the Irish Government was claiming:

(a) That detention and internment under Northern Ireland emergency legislation was an administrative practice in violation of Articles 5 and 8 of the Convention. They conceded that an emergency existed for the purposes of Article 15 but claimed that the emergency measures taken by the United Kingdom Government, derogating from their obligations under the Convention, were not strictly required by the exigencies of the situation. ²⁶

²² PARKER REPORT, *supra* note 13, para. 21, at 22.

²³ For the full statement, see ECHR REP., *supra* note 1, at 390.

²⁴ *Id.* 460.

²⁵ *Id.* Directions to prosecute had been given in 86 cases; no prosecutions have been directed in 952 cases. Between August 1971 and January 31, 1975, damages were paid in respect of 473 claims for false arrest, false imprisonment, and assault and battery; 1,193 claims were still outstanding. *Id.* 461.

²⁶ *Id.* 9-103.

view the operation if he saw the techniques being applied. Further, we think that such expressions as "humane," "inhuman," "humiliating" and "degrading" fall to be judged by such an observer in the light of the circumstances in which the techniques are applied, for example, that the operation is taking place in the course of an urban guerilla warfare in which completely innocent lives are at risk; that there is a degree of urgency; and that the security and safety of the interrogation centre, of its staff and of the detainees are important considerations.¹⁷

They also took the view that application of the five techniques was moral, appealing to arguments based on the fact that there was an emergency, that valuable intelligence had been gained, that innocent lives were at stake, and that in this situation time was of the essence. Again effective safeguards against excessive use were required.¹⁸

A minority report written by Lord Gardiner differed fundamentally from that of the majority.¹⁹ On legal grounds, the Compton techniques were contrary to domestic law and possibly international law. Because of their invalidity in domestic law, no minister or directive could have validly authorized their use.²⁰ He also believed the techniques to be morally unjustifiable and stressed such factors as the proven physical and mental effects of sensory deprivation techniques and the ability to acquire information using well tried and effective wartime methods involving "stool pigeons" and the use of microphones.²¹ On a practical level, he noted that the alienation of the local population caused by these techniques rendered

¹⁷ *Id.*, para. 30, at 6-7. For a critique of the Parker Report, see Lowry, *Ill-Treatment, Brutality and Torture: Some Thoughts upon the "Treatment" of Irish Political Prisoners*, 22 DE PAUL L. REV. 553-81 (1972). The majority report claimed that substantial "hard" intelligence gains had resulted from the use of these interrogation methods. PARKER REPORT, *supra* at 5. But see Lord Gardiner's submissions on these points, *id.* 18. Although the five techniques were officially discontinued, the Ministry of Defence has admitted that British military personnel are still being trained to use and resist the five techniques for defensive purposes only. See Irish Times, Sept. 7, 1976.

¹⁸ PARKER REPORT, *supra* note 13, paras. 35-42, at 7-9. The safeguards were: (1) the techniques should only be applied in conformity with the Directive and guidelines should be drawn up to assist personnel; (2) the techniques should only be applied under express authority of a U.K. Minister; (3) a Senior Officer should be in control at the interrogation centre and would carry personal responsibility; (4) a panel of highly skilled interrogators should be available to reduce the need to use the techniques; and (5) a doctor with psychiatric training should be present.

¹⁹ *Id.* at 11-12.

²⁰ *Id.* para. 10(d), at 14. Lord Gardiner noted the provisions of international instruments which were relevant but expressed no opinion as to whether the five techniques violated these provisions. On the issue of their compatibility with Article 3 of the European Convention on Human Rights, he felt the issue to be *sub judice*. *Id.* para. 11(b), at 15.

²¹ *Id.* paras. 13-16, at 16-19. In both the Compton and Parker Reports Lord Gardiner was the only member to characterize the five techniques as a form of sensory deprivation. This is a well recognized method of inducing severe stress by an artificial deprivation of the senses—auditory, visual, tactile, and kinesthetic—in order to weaken morale and the habitual defenses of the victim. See J. McGUFFIN, *THE GUINEAPIGS* 36-43, (1974); AMNESTY INTERNATIONAL, REPORT ON TORTURE, *supra* note 10, at 35-51.

tions of 1949.¹⁴ The Joint Directive, which had been amended in 1957 as a result of the Bowen Report on interrogation of suspected terrorists in Aden,¹⁵ set forth the basic principles governing military interrogations as follows:

TREATMENT OF DETAINEES

5. Broad principles for the treatment of persons under arrest or detention during civil disturbances are laid down in Article 3 of The Geneva Convention Relative to the Treatment of Prisoners of War (1949). Military personnel will follow these principles when conducting interrogation. These principles are—

(a) Persons taking no active part in hostilities shall in all circumstances be treated humanely without any adverse distinction founded on race, colour, religion or faith, sex, birth, wealth or any other similar criteria.

(b) The following acts are prohibited—

(i) Violence to life and person, in particular mutilation, cruel treatment and torture;

(ii) outrages upon personal dignity, in particular, humiliating and degrading treatment.

6. Under conditions of emergency or near emergency, there is likely to be internal security legislation controlling the treatment of detainees and arrested persons. Legislation will vary from country to country and reflect prevailing conditions. Military personnel are to acquaint themselves with the laws of the country concerned, and will not act unlawfully under any circumstances whatever.¹⁶

The Committee noted that the five techniques had played an important part in counterinsurgency operations in Palestine, Malaya, Kenya, and Cyprus and more recently in the British Cameroons (1960-61), Brunei (1963), British Guiana (1964), Aden (1964-67), Borneo/Malaysia (1965-66), and the Persian Gulf (1970-71), as well as in Northern Ireland (1971). However the question confronting them was whether the five techniques could be said to comply not only with the Joint Directive but also with the moral standards of a civilized and humane society. On both these issues the Committee was divided. The majority considered that the use of the five techniques, subject to proper safeguards, was justified in the circumstances. Analyzing the Directive, they considered that:

Whether or not what is done is in conformity with the Directive falls on our view to be judged by how the dispassionate observer would

¹⁴ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, dated at Geneva, Aug. 12, 1949, 6 UST 3114, TIAS No. 3362, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, dated at Geneva, Aug. 12, 1949, 6 UST 3217, TIAS No. 3363, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, dated at Geneva, Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War, dated at Geneva, Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

¹⁵ Cmnd. No. 3165 (1966).

¹⁶ This extract appears as an appendix to the Parker Report, *supra* note 13.

The Committee concluded that each of these five interrogation techniques constituted physical ill treatment but not "physical brutality." The crucial distinction lay in the minds of the interrogators, according to the report:

We consider that brutality is an inhuman or savage form of cruelty, and the cruelty implies a disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim's pain. We do not think that happened here.⁹

The unrealistic nature of the requirement of an evil *means rea* as an element in the legal definition of brutality was noted by many academic commentators as meaning that an extreme method of interrogation such as electroshock would be neither cruel nor brutal, provided it was used for the sole purpose of obtaining information.¹⁰ In addition, the Committee had examined the techniques separately and omitted to give any opinion on their combined application, although given such a limited definition, it is unlikely that its opinion would have been other than what it was. Further procedural limitations contributed to destroy the credibility of the report. The hearings were in secret and, although a complainant was allowed to be accompanied by a legal representative, he was not permitted to cross-examine witnesses or to have access, as of right, to transcripts of evidence.¹¹ Perhaps most striking of all, given the nature of the five techniques, was the decision to limit the inquiry only to physical ill treatment and not to examine its psychological impact.¹²

The unsatisfactory, unconvincing, and limited approach of the Compton Committee led to the establishment of a second committee, chaired by Lord Parker, which was asked to examine whether the authorized interrogation procedures required amendment.¹³ Their starting point was the established guidelines for security operations contained in the Joint Directive on Military Interrogation in Internal Security Operations Overseas which draws literally from the Common Article 3 of the Geneva Conven-

⁹ *Id.* para. 105, at 23. This paragraph represents the total discussion on the meaning of the concept of brutality. The concept of torture and its possible meaning and relationship to brutality and ill treatment are not mentioned. A second Compton Report (not available to the public) considered the case of three other men who had been subjected to the five techniques. There was one finding of ill treatment. See *The Times* (London), Nov. 17, 1971, at 5.

¹⁰ See Brownlie, *Interrogation in Depth: The Compton and Parker Reports*, 35 MOD. L. REV. 501-07 (1972). R. HULL, *THE IRISH TRIANGLE, CONFLICT IN NORTHERN IRELAND* 180-86 (1976); AMNESTY INTERNATIONAL, *REPORT ON TORTURE* 100-08 (1973).

¹¹ COMPTON REPORT, *supra* note 7, para. 19, at 5. The hearing was in secret "in order to ensure the personal safety of members of the security forces against whom allegations might be made and that there should be no opportunity for a confrontation between complainants and the members of the security forces against whom complaints were made." *Id.* para. 3, at 1.

¹² See HULL, *supra* note 10, at 182.

¹³ REPORT OF THE COMMITTEE OF PRIVY COUNSELLORS APPOINTED TO CONSIDER AUTHORISED PROCEDURES FOR THE INTERROGATION OF PERSONS SUSPECTED OF TERRORISM, Cmnd. No. 4901 (1972). The Committee consisted of Lord Parker of Waddington, Mr. J. A. Boyd-Carpenter, and Lord Gardiner [hereinafter referred to as PARKER REPORT].

with by the ordinary means of law.⁵ The inadequacy of the normal legal process in times of stress was further elaborated in the Gardiner Report:

When times are relatively normal, the needs of an ordered society may be met by the criminal courts functioning with a high regard for the Common law's presumption of innocence and a strict observance of the rules of evidence and the standards of proof. But when normal conditions give way to disorder and lawlessness, with the extensive terrorism causing widespread loss of life and limb and the wholesale destruction of property, the courts cannot be expected to maintain peace and order in the community if they have to act alone. The very safeguards of the law then become the means by which it may be circumvented. Terrorism means widespread intimidation in all sections of the community. Material witnesses refuse to testify on the peril of their lives, and the law will not accept hearsay evidence; and furthermore police officers who have knowledge and belief about the commission of certain offences may find their conclusions inadmissible in court, because they cannot satisfy the law's necessarily stringent requirements.⁶

On August 9, 1971, 342 men were arrested. Those to be detained were transported to places of detention throughout Northern Ireland with the exception of a small group which had been selected for interrogation in depth. Before the end of the week, Irish newspapers were describing in detail what was meant by "interrogation in depth," and in response to a storm of protest over allegations of torture and brutality a Committee of Enquiry, chaired by the British Ombudsman, Sir Edmund Compton, was set up.⁷

The Committee investigated allegations concerning forty men and concluded that eleven of them had been subjected to methods of treatment which included:

- (a) keeping the detainees' heads covered by a black hood except when being interrogated or in a room by themselves;
- (b) submitting the detainees to continuous and monotonous noise of a volume calculated to isolate them from communication;
- (c) depriving the detainees of sleep during the early days of the operation;
- (d) depriving the detainees of food and water other than one pound of bread and one pint of water at six hourly intervals;
- (e) making the detainees stand against a wall in a required posture (facing wall, legs apart, with hands raised up against wall).⁸

⁵ ECHR REP., *supra* note 1, at 97. See also REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND (DIPLOCK REPORT), Cmnd. No. 5185 (1972).

⁶ REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND, Cmnd. No. 5847, at 42 (1975).

⁷ REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY IN NORTHERN IRELAND ARISING OUT OF EVENTS ON THE 9TH AUGUST 1971, Cmnd. No. 4823 (1971) [hereinafter cited as COMPTON REPORT].

⁸ *Id.* paras. 58-67, at 15-17 [hereinafter referred to as the five techniques].

TORTURE AND EMERGENCY POWERS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: IRELAND v. THE UNITED KINGDOM

By Michael O'Boyle *

FACTUAL BACKGROUND

With the arrival of the British Army in August 1969, in aid of the civil power, intercommunal strife in Northern Ireland entered a new phase, which saw the regeneration of the Irish Republican Army (IRA) and the emergence of a guerrilla conflict between the IRA and British Army.¹ In the first half of 1971, 8 civilians, 10 soldiers, and 2 members of the Royal Ulster Constabulary (RUC) had been killed; 454 civilians, 110 soldiers, and 71 policemen had been injured. In July 1971 alone, traditionally a period of acute tension, there had been 86 explosions, 2 soldiers had been shot dead, and 21 persons injured.² It was this rising tide of violence that set the scene for the introduction of internment without trial on August 9, 1971.

Internment under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922³ had been a traditional weapon at the disposal of the Stormont regime in dealing with threats against the security of the state. It had been used, by and large successfully, in military terms in 1922-1926, 1939-1944, and 1956-1962, though directed exclusively against the Catholic population.⁴ The underlying official policy beneath this introduction in 1971 was primarily to obtain more intelligence information about the IRA and to detain individuals on a preventive basis who could not be dealt

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¹For the history of this phase in the current Northern Ireland troubles, see K. BOYLE, T. HADDEN, & P. HILLYARD, *LAW AND STATE: THE CASE OF NORTHERN IRELAND* 27-56. (1975); The Sunday Times Insight Team, *Ulster* (1972); Ireland v. The United Kingdom, Application No. 5310/71, REPORT OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS 151-220 (adopted Jan. 25, 1976) [hereinafter cited as ECHR REP.].

²For statistics on violence in Northern Ireland during the current emergency, see ECHR REP., *supra* note 1, at 533-37. The total fatalities arising out of the Northern Ireland problem from 1968-1975 are 1,391. See, R. ROSE *NORTHERN IRELAND: A TIME OF CHOICE* 25 (1976).

³12 and 13 Geo. V. (N.I.) 1922. Excerpts in ECHR REP. *supra* note 1, at 517.

⁴For accounts of Northern Ireland emergency legislation, see BOYLE, HADDEN, HILLYARD, *supra* note 1, at 1; W. TWINING *et al*, *EMERGENCY POWERS: A FRESH START* 466 (1972); Carroll, *The Search for Justice in Northern Ireland*, 6 N. Y. J. INT. LAW & POLITICS (1973); Palley, *The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution*, 1 ANGLO-AMERICAN L. REV. 368, at 400-03 (1972); Lord Macdermott, *Law and Order in Times of Emergency*, 17 JURIDICAL REV. 1 (1972); J. NARAIN, *PUBLIC LAW IN NORTHERN IRELAND*, *passim* (1975).

of the *North Sea* cases in the context of the continental shelf problem of islands. The model has two distinct functions. First, and most important, it imparts content to the "equitable principles" standard of delimitation and thus provides a suggested approach to future delimitation controversies governed by that standard.¹²⁰ Second, the model provides a theoretical framework for the analysis and classification of state practice by facilitating the determination of the significance of the treatment of islands in a given agreement.

The interaction of these two functions may make the model a useful tool for the study of the formation of the customary international law of continental shelf delimitation. Agreements concluded by states which are parties to the 1958 Convention or which may become parties to a new Law of the Sea Convention are or will be evidence of the principles of international law that are contained in those treaties.¹²¹ Further, the agreements themselves may also be taken as evidence of such law independent of the existence of a multilateral treaty.¹²² In both cases, the fact that the model serves to distinguish those agreements where the treatment of islands is significant from those where it is not will in turn be useful in deciding the weight to be given to each agreement in determining what principles of delimitation, if any, have passed into customary international law.¹²³

¹²⁰ Article 83, paragraph 2, of the Composite Text provides that, if agreement on delimitation is not reached within a reasonable time, the states involved must resort to the dispute settlement procedures of Part XV of the Text. The model may be useful in the course of these judicial or arbitral proceedings.

¹²¹ See generally Baxter, *Treaty and Custom*, 129 HAGUE ACADEMY, RECUEIL DES COURS 25, 26-75 (I, 1970).

¹²² However, it is much more difficult to extract principles or rules of customary international law from bilateral treaties. See *id.* at 75-91.

¹²³ See [1969] ICJ REP. 3, 227 (Dissenting Opinion of Judge Lachs); Baxter, *supra* note 121, at 66.

be divided according to a 2:1 ratio in favor of Greece.¹¹⁷ One such possible division would be to allot to Turkey the continental shelf area between the territorial seas of the Kikladhes and those of the Dodecanese and other islands fringing the Turkish coast and to allot to Greece the shelf area between the Kikladhes and Crete to approximately longitude 26°00'W.

Finally, if the delimitations just described are aggregated, the total continental shelf area of the Aegean would have been divided in a ratio of approximately 2:1 in favor of Greece.¹¹⁸ This ratio is comparable to the ratio of Greek and Turkish coastlines bordering the Aegean and as such, would seem to be representative of a delimitation according to equitable principles.¹¹⁹

IV.

CONCLUDING THOUGHTS

The model proposed herein combines a systematic analysis of the contemporary state practice in maritime delimitation with an interpretation

¹¹⁷ When "measured in the general direction of the coastline," [1969] ICJ REP. 3, 54, the Greek mainland coastline is approximately 150 miles in length and the Turkish coastline is about 140 miles in length. The operative coastline, *see* note 86, *supra*, and accompanying text, of Crete is 160 miles. Thus the continental shelf area in this region should be allocated in the proportion

$$\frac{160 + 150}{140} = \frac{310}{140} \text{ or approximately } \frac{2}{1}$$

It must be recognized that there is a certain amount of subjectivity in a measurement "in the general direction of the coastline" which depends upon the degree to which one ignores coastal irregularities. This will not make a difference in this case because both Greece and Turkey have coastlines with similar degrees of irregularity and thus a more exacting measurement would not destroy the underlying ratio.

¹¹⁸ North of latitude 38°00'N, the coastline of Greece is approximately 380 miles in length while the coastline of Turkey is approximately 220 miles in length. Thus, when combined with the coastline ratio below that latitude, *see* note 117, *supra*, the ratio of total Aegean coastline is

$$\frac{310 + 380}{140 + 220} = \frac{690}{360} \text{ or again approximately } \frac{2}{1}$$

Thus Greece would receive approximately

$$\frac{690}{690 + 360} = \frac{690}{1050} = 66\%$$

of the Aegean continental shelf.

¹¹⁹ Though none of the Greek islands other than Crete would be classified as substantial under the model in the author's opinion, *see* note 116, *supra*, the inclusion of those islands which individually constitute more than 5% of the total coastline would increase Greece's share of the shelf only marginally. The three islands which would come under the 5% cutoff would be Lesbos, Rhodes, and Karpathos with approximate maximum lengths of 42, 50, and 36 miles respectively. The inclusion of these islands would increase Greece's share of the shelf from 66%, note 118, *supra*, to

$$\frac{690 + 138}{1050 + 138} = \frac{828}{1188} = 70\%.$$

See note 89, *supra*.

lines which serve to establish the features of a delimitation of the Aegean continental shelf according to equitable principles.¹¹²

First, the northern part of the Aegean (between latitude 41°00'N and latitude 39°30'N) can be analyzed under the primary phase of the model. If that area were to be delimited according to the principle of equidistance, three islands—Samothrace, Limnos, and Aghios Eustratios—would lie on the lateral line (Zone C). Accordingly, these islands should not be used as basepoints¹¹³ and are entitled only to territorial seas. The lateral line should be modified so as to allow for the existence of these territorial seas.¹¹⁴

Second, the mid-Aegean (between latitude 39°30'N and latitude 38°00'N) can also be analyzed under the primary phase of the model. If that area were delimited according to the principle of equidistance, four Greek islands would lie completely across the median line (Zone D). The two largest islands—Lesbos and Chios—each lie only about five miles from the Turkish mainland. The use of these islands as basepoints would deprive Turkey of any continental shelf areas in the mid-Aegean, a result not commensurate with the length of Turkey's coastline in that area. Accordingly, these islands are entitled only to territorial seas and should not be used as basepoints.¹¹⁵ In this same region, two much smaller islands—Psara and Antipsara—are located approximately twelve miles from Chios. These islands should be given territorial seas only which, though at some distance from the median line, would be contiguous with the territorial sea of Chios.

Third, the southern Aegean (between latitude 38°00'N and latitude 35°00'N) contains three insular clusters which must be considered—the Kikladhes (Zones B and C), Crete and its adjacent islands (Zones B and C), and the islands fringing or very near the Turkish coast (Samos, Ikaria, and the Dodecanese group) (Zone D). All of these islands should be accorded territorial seas even though the allocation of such seas to the islands near the Turkish coast effectively isolates Turkey from the continental shelf areas beyond and severely reduces the size of those areas. However, none of the islands except Crete should be given any other effect in the delimitation of this region.¹¹⁶ The maximum length of Crete is included in the proportional analysis of the secondary phase of the model which dictates that the continental shelf area of the southern Aegean should

¹¹² The islands which will be discussed include those named in the Greek Application to the International Court, namely

. . . the islands of Samothrace, Limnos, Aghios Eustratios, Lesbos, Chios, Psara, Antipsara, Samos, Ikaria, and all the islands of the Dodecanese group (Patmos, Leros, Kalimnos, Kos, Astypalaia, Nisiros, Tilos, Simi, Chalki, Rhodes, Karpathos, etc.) . . .

Id. at 6.

¹¹³ However if Samothrace was used as a basepoint, there would be no significant distortion of the lateral line if the Turkish island of Imroz was also used as a basepoint.

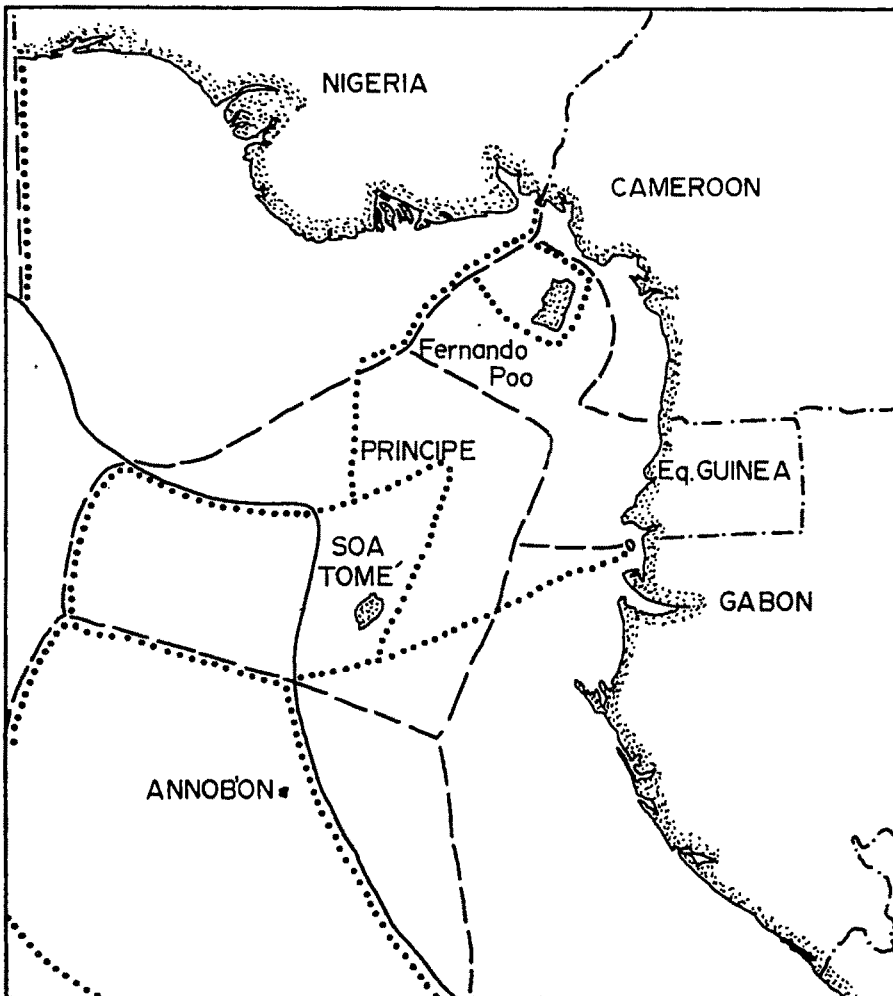
¹¹⁴ Both Greece and Turkey claim territorial seas of six miles in width.

¹¹⁵ The possibility of giving some proportional effect to Lesbos is considered in note 119, *infra*.

¹¹⁶ Crete is substantial in that it constitutes more than 50% of the Greek coastline south of latitude 38°00'N and approximately 25% of the total Aegean coastline of Greece. See notes 87–89, *supra*, and accompanying text. None of the other islands constitutes more than 7% of the total Greek coastline.

MAP II

Proposed Delimitation: Cameroon–Equatorial Guinea–Gabon
Nigeria–Sao Tomé and Príncipe



— The equidistance line drawn using islands as basepoints.

..... The boundary line suggested by the model.

varying sizes located throughout the Aegean, several lie only a few miles from the Turkish coast on the Turkish continental shelf as defined by the 200-metre isobath. The application of the model to this situation does not produce an obvious solution. However, it does suggest some guide-

taneously requested a meeting of the UN Security Council and instituted proceedings in the International Court of Justice. *See generally* Gross, *The Dispute Between Greece and Turkey Concerning the Continental Shelf in the Aegean*, 71 AJIL 31 (1977). The Court denied the Greek request for interim measures of protection and left to later resolution the question whether it has jurisdiction to entertain the merits of the controversy. *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976*, [1976] ICJ REP. 3.

One of the most complicated delimitation problems imaginable is presented by the current dispute between Greece and Turkey over the continental shelf of the Aegean Sea.¹¹¹ Of the numerous Greek islands of

island would be included in a proportional allocation while a dependent island of the same size would still have to be "substantial" relative to the state to which it belongs before it could be included in such an allocation. This difference may be of little practical significance if an independent insular state is relatively small with respect to the other delimiting states and hence, in that situation, political status would tend to be immaterial.

The secondary phase of the model may also provide an appropriate framework for treating the "distant island" problem. See note 51, *supra*. The extension of the primary phase of the model to this situation would dictate that the distant island should be allocated only a territorial sea, a not wholly satisfactory result in most instances. However, the application of the primary phase assumes that the island's coastline is quite small or insignificant relative to the coastline of the state to which it belongs, one of the basic premises underlying that phase of the model. See notes 40-42, *supra*, and accompanying text. Since the mainland territory of the state to which the distant island belongs is, by definition, see note 51, *supra*, not involved in the delimitation, the extent of the mainland coastline of that state would seem to be irrelevant. Rather, the extent of the island's coastline relative to the coastlines of the other delimiting states would seem to provide a more appropriate and equitable measure of the effect to be given a distant island.

Thus, there are two situations where the secondary phase of the model could be equitably applied without the necessity of first determining whether the island's coastline constitutes a "substantial" portion of the total coastline of the state to which it belongs. First, the case of the independent insular state for the obvious reason that there is no other coastline with which it could be compared. Second, the case of the distant island where the coastline of the mainland state is not involved and thus is entitled to no effect in the delimitation. If the secondary phase of the model is applied in both of these situations, there will be no delimitation problems when a dependent distant island attains independence or when some islands in a distant island group choose independence and others do not (e.g., Comoros).

¹⁰⁹ Since maritime territory which is more than 200 miles from the land territory of a state cannot be allocated to that state, note 104, *supra*, it is sometimes impossible to allocate the maritime space according to the exact proportions dictated by the secondary phase of the model, especially in the case of delimitations between adjacent states. This is the situation in Map II with respect to Sao Tomé and Príncipe and also with respect to Annobón, which was not even included in the proportional allocation. See note 106, *supra*. This factor will in many cases actually reduce the sometimes harsh effects of proportionally allocating maritime space to a small independent insular state or a small distant island under the secondary phase of the model.

¹¹⁰ There are an almost infinite number of ways in which the boundary line can be drawn so as to effect a division of the maritime area according to the stated proportions. Due to this fact, it may also be possible, in the case where the area to be delimited contains known deposits of resources, to draw the boundaries such that the areas containing these resources are divided among the delimiting states according to the same proportions.

The secondary phase of the model could also be employed on a smaller scale to effect a proportional allocation between Equatorial Guinea (Annobón) and Sao Tomé and Príncipe of the area more than 200 miles from the African mainland though such a delimitation is not depicted in Map II.

¹¹¹ See generally Phylactopoulos, *Mediterranean Discord: Conflicting Greek-Turkish Claims on the Aegean Seabed*, 8 INT. LAWYER 431 (1974).

In August 1976, the Greek Government, angered by a Turkish vessel's seismic exploration of the continental shelf area between the islands of Limnos and Lesbos, simul-

maritime territory of another state or states calculated in similar fashion should be included in the proportional delimitation. This would dictate that Cameroon, Equatorial Guinea, Gabon, Nigeria, and Sao Tomé and Príncipe be included.¹⁰³ The area to be allocated would then involve all of the maritime territory within 200 miles of any of the included states.¹⁰⁴

The coastline of Equatorial Guinea is approximately ninety miles in length and the operative coastline (maximum length)¹⁰⁵ of Fernando Poo is about fifty miles. Thus Fernando Poo accounts for a "substantial"¹⁰⁶ portion (36%) of the total coastline of Equatorial Guinea. The operative coastlines of Sao Tomé and Príncipe add up to approximately forty miles, and the mainland coastlines of Cameroon, Nigeria, and Gabon are about 200, 500, and 475 miles in length, respectively. The application of the criterion of proportionality dictates that the maritime area in question should be divided among these states as follows:¹⁰⁷ Cameroon (15%); Equatorial Guinea (10%); Gabon (35%); Nigeria (37%); and Sao Tomé and Príncipe (3%).¹⁰⁸ One possible delimitation approximating¹⁰⁹ these proportions is depicted by the dotted line in Map II.¹¹⁰

¹⁰³ A state might decline to participate in a delimitation such as this for political reasons or because the number or identity of the other states involved will place it at a disadvantage under the proportional allocation framework of the secondary phase of the model.

¹⁰⁴ No state will be allocated any maritime territory that is located more than 200 miles from its land territory.

¹⁰⁵ See note 86, *supra*, and accompanying text.

¹⁰⁶ See notes 87-89, *supra*, and accompanying text. Annobón is not substantial under this test and thus is entitled to no effect in the proportional allocation. However, due to its location, Annobón will be able to claim maritime space beyond the 200-mile limits of the other delimiting states. See note 109, *infra*.

¹⁰⁷ The total length of the coastlines is 1355 miles. The ratio of each state's coastline to this total coastline will determine that state's proportional share of the area to be divided. Thus, the shares are as follows:

$$\begin{aligned} \text{Cameroon} &= \frac{200}{1355} = 15\% & \text{Equatorial Guinea} &= \frac{140}{1355} = 10\% \\ \text{Gabon} &= \frac{475}{1355} = 35\% & \text{Nigeria} &= \frac{500}{1355} = 37\% \\ \text{Sao Tomé and Príncipe} &= \frac{40}{1355} = 3\% \end{aligned}$$

If not all of the states participated in the delimitation, see note 103, *supra*, the secondary phase of the model could still be used. However, its application in such a case would involve the allocation of a smaller area and also require that the possible claims of the non-participating states be considered and preserved. See [1969] ICJ REP. 3, 54.

¹⁰⁸ It should be noted again that independent insular states are treated the same as mainland states. See note 3, *supra*. Under the *secondary* phase of the model, it thus turns out that independent insular states (*e.g.*, Sao Tomé and Príncipe) are treated the same as dependent islands of substantial size, *i.e.*, they are given an effect proportional to their relative size.

The question which remains is whether or not the presence of an independent insular state, in the absence of any other factors justifying the application of the secondary phase of the model (*e.g.*, concave coastline or a substantial dependent island), should nonetheless be treated under that phase. Such an approach would indeed seem to be equitable in most instances though it would diminish the importance of political status as a factor in delimitation. The fact of independence would insure that an

Lampedusa, Linosa, and Lampione present a more difficult problem because they are well beyond the median line (Zone D) and are located in maritime space that seemingly should be divided between Tunisia and Malta.⁹⁹ Under the model these islands are entitled only to a territorial sea. (See Map I). This solution may be subject to criticism on the ground that it creates too many "pockets" of maritime space subject to the jurisdiction of different states. If this is indeed viewed as a problem, the island's territorial seas could be connected and Tunisia and Malta would then receive areal compensation for the continental shelf area displaced by the connecting passages.¹⁰⁰

The classic example of an island interfering with a delimitation between adjacent states is the case of Fernando Poo, belonging to Equatorial Guinea, which lies off the coast of Cameroon (Zone D). The use of this island as a basepoint would severely restrict the extent of the continental shelf of Cameroon and its exclusive economic zone. The situation is further exacerbated by (1) Cameroon's position on a concave coastline between Nigeria and Equatorial Guinea which is reminiscent of Germany's location with respect to Denmark and the Netherlands in the *North Sea* cases;¹⁰¹ (2) the presence of the recently independent insular state of Sao Tomé and Príncipe; and (3) the presence of several inhabited (Annobón, Corisco, Elobey Grande, and Elobey Chico) and uninhabited islands, belonging to Equatorial Guinea, which lie in Zones C and D on the Equatorial Guinea-Gabon boundary (Map II).¹⁰²

It is obvious that this is one of those cases where the application of the primary phase of the model—employing the principle of equidistance and allocating Fernando Poo only a territorial sea—will lead to an unsatisfactory if not inequitable result. However, the secondary phase of the model, utilizing the Court's "proportionality of coastline" criterion, provides a suitable framework within which the effects of Fernando Poo, Sao Tomé and Príncipe, and the concave coastline can be analyzed.

In order to apply the secondary phase of the model, it is first necessary to determine which states should be involved in the proportional allocation and hence the area that is to be so allocated. Any state whose maritime territory, if extended to the 200-mile limit, would significantly overlap the

⁹⁹ It must be remembered that independent insular states are treated the same as mainland states. See note 3, *supra*. Thus, under the *primary* phase of the model, the treatment of Malta in this fashion does result in the allocation of a continental shelf area to Malta that is disproportionately large in relation to the island's relative size. The appropriateness of treating independent insular states under the primary phase of the model and the apparent inconsistencies resulting from that treatment are discussed in note 108, *infra*.

¹⁰⁰ The choice of solutions will depend on the individual preferences of the states involved since some states will presumably be more interested in maximizing their maritime area while other states will be more interested in maintaining continuity in that area.

¹⁰¹ [1969] ICJ REP. 3. See Diagram I, *supra*.

¹⁰² With the exception of Annobón, these islands, though of critical importance to territorial sea delimitations between the two states, would not have any significant effect on the continental shelf or exclusive economic zone boundaries and are thus ignored for the purposes of this exercise.

able" which appeared in the definition of torture in the *Greek* case, the emphasis on the absolute nature of the prohibition of torture by the Commission is a valuable statement. It affirms three propositions which expand and clarify the inviolable status of the international norm against torture and inhuman and degrading treatment.

First, there are no circumstances when torture or inhuman and degrading treatment can ever be justified, even where emergency conditions prevail. The fact that the authorities need urgent information to combat terrorism and that the security forces may be subjected to intolerable stresses and strains are not circumstances justifying torture. Further, what amounts to torture and inhuman and degrading treatment depends on objective tests unrelated to the requirement in the Compton Report of a wicked disposition to take pleasure in the victim's pain. Finally expressions such as "torture" are not to be judged, as the Parker Report urged, in the context of urban guerrilla warfare. The context of their application is not a relevant factor in determining whether interrogation techniques amount to torture. The availability of safeguards to avoid abuses is equally irrelevant. In the light of this part of the Commission's decision, underlining the absolute character of Article 3, it could be argued that that article is a specific example of *ius cogens* or a peremptory norm of general international law from which there can be no treaty derogation.⁵⁹

Article 53 of the Vienna Convention on the Law of Treaties provides:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁶⁰

Accepting that Article 3 has its counterpart in the Universal Declaration of Human Rights,⁶¹ the UN Covenant on Civil and Political Rights,⁶² the Inter-American Convention on Human Rights;⁶³ the UN Declaration on Torture, Inhuman and Degrading Treatment;⁶⁴ Common Article 3 of the Geneva Convention;⁶⁵ and that it has probably become part of customary international law, it would appear to be a norm of international law accepted and recognized by the international community of states as a whole as required by Article 53 of the Vienna Convention. Its character as *ius*

⁵⁹ For a review of the academic development of the concept of *ius cogens*, see G. I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 147-61 (1974); Schwarzenberger, *International Jus Cogens*, 43 *TEXAS L.R.* 455 (1965); Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 *AJIL* 946 (1967); J. SETUCK, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES* (1974).

⁶⁰ UN Doc. A/CONF.39/27 (1969), 63 *AJIL* 875 (1969).

⁶¹ *Supra* note 32.

⁶² G.A. Res. 2200. 21 GAOR, Supp. (No. 16) 49, UN Doc. A/6316 (1966).

⁶³ OAS, T.S. No. 36, at 1, OAS OFF. REC., OEA/SER.A/16 (1969).

⁶⁴ *Supra* note 56.

⁶⁵ *Supra* note 14.

cogens is arguably enhanced by the Commission's decision that it is a norm from which there can be no derogation in any circumstances. It follows that, if a state is bound by treaty and customary international law not to subject individuals to torture or inhuman and degrading treatment, it is also bound not to exercise its treaty-making power in violation of the same norm.

One difficulty with this analysis is that Article 3 is not as absolute a guarantee as the Commission contended. It must be examined in the light of several qualifications. In the first place, as Commissioner Fawcett points out in a Separate Opinion, while in theory the prohibition of inhuman treatment or torture is absolute under the Convention, what constitutes inhuman treatment in specific situations is open to varying interpretations, depending on the character and circumstances in which it is inflicted. Consequently "the notion of inhuman treatment or torture is not then absolute."⁶⁶ Further, the inherent uncertainty of what is meant by inhuman and degrading treatment is reflected in the unexpectedly wide variety of situations dealt with by the Commission under that heading. For example, the Commission has dealt with complaints of inhuman treatment relating to the extradition of an individual to a country where he faced the death penalty;⁶⁷ the nonadmission by the United Kingdom of passport holding African Asians;⁶⁸ and the force feeding of prisoners on hunger strike and the conditions of detention.⁶⁹ In addition the Commission itself noted that the borderline between "a certain roughness of treatment" and physical violence which was cruel or excessive was often a relative question varying between different societies or different sections of them. These qualifications simply illustrate the difficulty of determining the violation of the norm in particular circumstances. The norm can be seen in terms of having a fixed core of settled meaning, as far as torture is concerned, surrounded by a penumbra of uncertain meaning in relation to what is meant by "inhuman" or "degrading" treatment. Since most norms share this difficulty, this ought not by itself deprive it of the character of *jus cogens*.

THE CONCEPT OF ADMINISTRATIVE PRACTICE⁷⁰

There was substantial disagreement between the parties as to what exactly was meant by an administrative practice under the Convention. The Irish Government, basing its observations on the *First Greek* case,

⁶⁶ ECHR REP., *supra* note 1, at 495-97.

⁶⁷ See *Kerkoub v. Belgium*, Application No. 5012/71, 40 COLLECTED DECISIONS 55 (1972) [hereinafter COLL. DEC.]; *Amerkrane v. United Kingdom*, Application No. 5961/72, 44 *id.* 101 (1973); *Kuzban v. Federal Republic of Germany*, Application No. 180/62, 6 YEARBOOK 462 (1970).

⁶⁸ See *East African Asians v. United Kingdom*, Application Nos. 4403/70, *et seq.*, 13 YEARBOOK 928 (1970).

⁶⁹ Greek case, *supra* note 33.

⁷⁰ See Hannum & Boyle, *Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice: The Donnelly Case*, 68 AJIL 440 (1974) and McGovern, *The Local Remedies Rule and Administrative Practice in the European Convention on Human Rights*, 24 INT. & COMP. L. Q. 121 (1975).

took the view that to establish an administrative practice of torture two elements were required. First, there had to be a repetition of acts of torture or ill treatment which are the expression of a general situation and are not merely isolated occurrences. Second, there has to be official tolerance of torture in the sense that the superiors of those immediately responsible take no action to punish them or prevent their repetition or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of these allegations.⁷¹ The United Kingdom joined issue on the level of tolerance that had to be shown to establish an administrative practice. Its argument proceeded on the basis that the factual situation pertaining in Greece was basically different from the present one and therefore the Commission ought to use different criteria in determining whether a practice existed. The essential difference between the *Greek* case and *Northern Ireland* was the difference between a military dictatorship persecuting those with views opposed to it and an accepted democratic country faced with an armed uprising. Furthermore, in the latter case, there were judicial remedies which were still adequate and effective. Given this vital distinction, the United Kingdom argued that it could only assume state responsibility under the Convention for an administrative practice where official tolerance could be found to exist at the highest level, *i.e.*, the level of the state.⁷² The level of the state meant "the level of the executive or an agency of the executive specifically entrusted by it with authority to order or promote the practice complained of."⁷³

The Commission took the opportunity to clarify and to define the concept of administrative practice under the Convention, drawing a distinction between the objective elements of administrative practice and the significance or function of administrative practice under the Convention.

The elements of an administrative practice were the same for both a dictatorship and a democratic system. They had been accurately described in the *First Greek* case as consisting of a "repetition of acts" and "official tolerance."

By *repetition of acts* is meant a substantial number of acts of torture or ill-treatment which are the expression of a general situation. The pattern of such acts may be either, on the one hand, that they occurred in the same place, that they were attributable to the agents of the same police or military authority, or that the victims belonged to the same political category; or, on the other hand, that they occurred in several places at the hands of distinct authority, or were inflicted on persons of varying political affiliations.⁷⁴

Emphasis was given to the idea that the acts were linked or connected to form a pattern or system.

By *official tolerance* is meant that, though acts of torture or ill-treatment are plainly illegal, they are tolerated in the sense that the su-

⁷¹ ECHR REP., *supra* note 1, at 254-60. ⁷² *Id.* 340-64.

⁷³ *Id.* 358.

⁷⁴ ECHR GREEK REP., *supra* note 40, at 195.

periors of those immediately responsible, though cognisant of such acts, take no action to punish them or prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings, a fair hearing of such complaints is denied.⁷⁵

The Commission, agreeing with the Irish Government, highlighted the fact that "official tolerance" may be found to exist on different levels, namely, that of the direct superiors of those immediately responsible for the acts involved or that of a higher authority. They completely rejected the notion, submitted by the United Kingdom, that state responsibility under the Convention was different from state responsibility under international law generally and could only arise when tolerance was shown at a level of the state.⁷⁶ In so doing they developed the fullest statement yet of the theoretical basis of state responsibility under the Convention.

The responsibility of a State under the Convention may arise for acts of all its organs, agents and servants. As in connection with the responsibility under international law generally, their rank is immaterial in the sense that in any case their acts are *imputed* to the State. It is true that there are further conditions for responsibility (breach of a norm, a victim, sometimes fault, and damage), and for the jurisdiction of the Commission (exhaustion of remedies and other formal requirements). The Commission is of the opinion that although the State can only incur *new* obligations through acts "at the level of the State" by persons duly authorised to bind it (e.g., to conclude a treaty), its existing obligations can be violated also by a person exercising an official function vested in him at any, even the lowest level, without express authorisation and even outside or against instructions.

"Responsibility" does not necessarily require any "guilt" on behalf of the State, either in a moral, legal or political meaning, and does not suggest any "tolerance" whatsoever of wrongdoing at the "level" of the State in the sense in which this expression has been used by the respondent Government.

The system of protection of human rights laid down by the Convention is shaped in the form of corresponding obligations of States. The result, procedurally, is that all complaints of violations must be directed against States as respondents. They are in this meaning "responsible" for any violations within the jurisdiction, for acts imputed to them as explained above.⁷⁷

The clearest case of an administrative practice is where a particular line of action has been authorized by the competent organs of the state. Here no further question arises as to repetition or tolerance. Some situations, however, can give rise to a presumption of tolerance on behalf of the authorities, for example, where repeated acts have received publicity. It was felt by the Commission that, while isolated acts might escape the knowledge of superiors, it was hardly conceivable that frequently repeated acts could do so.⁷⁸

⁷⁵ *Id.* 196.

⁷⁷ *Id.* 383.

⁷⁶ ECHR REP., *supra* note 1, at 382.

⁷⁸ *Id.* 386.

A final question arose as to whether the strain which was imposed on the security forces and which in turn produced violations of Article 3 could be taken into account in assessing whether an administrative practice existed. The Commission took as a hypothetical situation the strains on a police officer who questions a prisoner about the location of a bomb which was timed to explode in a public area in a short time. The Commission took the view that this could not justify a breach of Article 3, although it could be a mitigating factor taken into consideration by domestic courts in determining punishment. However, such sympathetic consideration by domestic authorities could not be regarded as "official tolerance" on the part of these organs for the purposes of determining the existence of administrative practice.⁷⁹

THE SIGNIFICANCE OR FUNCTION OF THE CONCEPT OF ADMINISTRATIVE PRACTICE UNDER THE CONVENTION

The classic statement of the significance of the concept of administrative practice is to be found in the *First Greek* case. The view was that, if an administrative practice could be made out, local remedies do not have to be exhausted. The rationale of the rule was as follows:

Where, however, there is a practice of non-observance of certain Convention provisions, the remedies prescribed will of necessity be side-stepped or rendered inadequate. Thus, if there was an administrative practice of torture or ill-treatment, judicial remedies prescribed would tend to be rendered ineffective by the difficulty of securing probative evidence, and administrative enquiries would either be not instituted, or, if they were, would be likely to be half-hearted and incomplete
...⁸⁰

The Commission, drawing a distinction between the function of administrative practice at the admissibility stage and at the merits stage, parted company with the simple rule that waiver of exhaustion of local remedies was the *automatic* consequence of establishing an administrative practice. In so doing they restated their views in the controversial *Donnelly* case.⁸¹ Whether or not remedies have to be exhausted when an allegation of administrative practice is made now depends on the level of tolerance that is shown to exist. If the level of tolerance is shown to exist at a high level of the state, such as the executive, then this fact alone would be a strong indication that the complainant has no possibility of obtaining redress through any national organ, including the courts, and therefore the domestic remedy rule is inapplicable. On the other hand, the domestic remedies rule may still apply where tolerance has been found to exist on lower levels, for example, by prison authorities or by the

⁷⁹ *Id.* 386-87.

⁸⁰ ECHR GREEK REP., *supra* note 40, at 194.

⁸¹ *Donnelly et al. v. United Kingdom*, Applications Nos. 5577-5583/72, 16 YEARBOOK 212 (1973). For the Final Decision of the Commission of Dec. 15, 1975, see 4 DECISIONS AND REPORTS (1976). See also Boyle & Hannum, *The Donnelly Case, Administrative Practice and Domestic Remedies under the European Convention: One Step Forward and Two Steps Back*, 71 AJIL 316 (1977).

commander of a regiment. It will be up to the Commission to examine the availability and effectiveness of the remedies in each particular case in order to ascertain if they ought to have been exhausted.⁸²

In such a situation it may normally be assumed that higher authorities and the courts would offer redress for the violation in question and there are therefore effective domestic remedies which must be exhausted. However, the Commission must here take into account the difficulty of securing probative evidence and have regard to the question whether or not the higher authorities of the State have themselves exercised their duty towards the individuals concerned to identify the practice and to prevent the occurrence or repetition of the acts in question.⁸³

At the examination of the merits, the significance of the administrative practice is that it denotes the gravity of the breach of the Convention. A breach is all the more serious if the official tolerance or condemnation exists at a higher level of the state and if the pattern of violations is widespread.⁸⁴

Although no reference was made by either the parties or the Commission in the development of the concept of "official tolerance" as an element of administrative practice to the principles of international criminal law which govern the liability of superiors for war crimes committed by subordinates, there is a close resemblance in the factors that constitute "official tolerance" and those that govern the liability of superior officers for war crimes. This can be seen clearly in the following extract from the Judgment in the Tokyo War Crimes Trial:

Nevertheless, such persons [*i.e.*, superiors] are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless:

(1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or

(2) They are at fault in having failed to acquire such knowledge.

If such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his Office required or permitted him to take any action to prevent such crimes. On the other hand it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.⁸⁵

⁸² ECHR REP., *supra* note 1, at 384-85, 388.

⁸³ *Id.* 385.

⁸⁴ *Id.* 385-86.

⁸⁵ Excerpt from main judgment in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW: CRIMES AND PUNISHMENT 617-18 (Bassiouni & Nanda eds. 1973). See also *In re Yamashita*, 327 U.S. 1 (1946), 4 UN WAR CRIMES COMMISSION, LAW REPORTS OF

In this context it is clear from the United Kingdom submission that state responsibility is assumed only where "official tolerance" exists at the level of the state and that there is a fundamental confusion between two principles of international law. The United Kingdom argued that:

Culpability was the key test. It must, through the appropriate agents, have acted with a guilty mind in breach of Art. 3 either by giving direct orders, possibly under cover of sham orders, or deliberately shutting their eyes to what was happening.

They could only be found blameworthy in that way, if through Ministers or senior officers, they had either authorised torture, inhuman or degrading treatment or connived at it by turning a blind eye.⁸⁶

The confusion inherent in this submission is between the rules, as stated above, which govern the criminal liability of superior officers for the acts of their subordinates and the rules, which are not generally concerned with issues of fault, governing state responsibility in international law. The effect of the Commission's decision in describing the basis of state responsibility in strict liability under the Convention (thereby conforming to general international law) is to maintain this vital distinction.

The clarification of the nature of state responsibility under the Convention and of the significance of the concept of administrative practice is a welcome advance. However, several problems still remain unresolved in this area. It is clear that one of the functions of administrative practice is procedural in the sense that it may be a basis for a waiver of the domestic remedies rule. Whether it is depends on the level of "official tolerance." If it is at the level of the state, remedies need not be exhausted. At lower levels, it becomes a question of fact to be decided in each case whether the remedies are adequate.

The paradox of this procedural explanation of the function of administrative practice is that, in determining whether an administrative practice exists, the Commission will have to examine an issue which belongs essentially to the merits of the case, namely, the question of the level of tolerance of the practice. The effect of this ruling is that in future cases the Commission will, as in the *Donnelly* case,⁸⁷ always have to join the issue to the merits and, after an examination of the merits, make a determination on the preliminary procedural issue. It is therefore difficult to see how the Commission could hold a case to be inadmissible on the basis of failure to exhaust local remedies, without recording implicit findings on the merits of the case. Further, it appears that the decision on the procedural significance of administrative practice fails to take account of the vital distinction between a remedy for a specific act of torture, on the one hand, and a remedy for the wider and more general issue of an administrative practice of torture, on the other. Adopting the Commission's approach in determining whether the remedies are adequate, where the

TRIALS OF WAR CRIMINALS 1 (1945) and United States v. Von Leeb *et al.*, 12 *id.* 1 (1949).

⁸⁶ ECHR REP., *supra* note 1, at 340-41.

⁸⁷ *Supra* note 81.

Administrative practice exists at the middle or lower levels of command, would involve an examination of the remedies for the specific act of torture. If these were found to exist and they had not been exhausted, the case would have to be ruled inadmissible, even though it is possible that there are simply no remedies whereby an individual could challenge the policy or practice, as opposed to merely a specific example of it. The argument assumes a stronger form in an interstate case, where the most important claim is the existence of a practice of torture the legality of which cannot ordinarily be challenged by ordinary individuals, particularly in a state which has no written constitution.

SENSORY DEPRIVATION AND THE CONVENTION

The U.K. Government consistently argued that, since the use of the techniques had been officially abandoned, the Commission should take official note of the abandonment of the techniques without expressing any opinion on the legal issues raised by them. This, it said, was the procedure adopted in the *First Cyprus* case. The Irish Government opposed this view and argued that the *First Cyprus* case was not relevant in this situation since the Commission took the decision not to examine the issues in the light of a friendly discussion leading toward a settlement between the parties.⁸⁸

The Commission stated forcibly not only that it would express an opinion on the legal issues arising out of Article 3 but that it was bound to do so for several compelling reasons. First, Article 19 of the Convention describes the Commission's function as being "to ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention." It was regular practice for the Commission to interpret its competence as going beyond the particular submissions, as determined by the character of the facts confronting it. In addition, although it was clear from the Parker Report that sensory deprivation techniques had been employed by the United Kingdom before, notably in counterinsurgency operations in other areas of the world, an opinion had never been expressed as to whether the techniques were in breach of the Convention. Sir Edmund Compton refrained from doing it, so did Lord Parker, and even Lord Gardiner said the issue was *sub judice*.⁸⁹ For the Commission to fail to express an opinion would be to shirk from its duty under Article 19. Finally, under the terms of the Convention and Article 31 in particular, the

⁸⁸ ECHR REP., *supra* note 1, at 391.

In that case a friendly settlement of the whole case was not secured but the Commission did not express its opinion on the merits. In so deciding the Commission observed that the "Convention does not expressly provide how the Commission shall act if . . . some of the grounds of complaint are removed in the course of the proceedings, but others remain, and a friendly settlement covering all controversial points has not been secured." Emphasizing the conciliatory function of the Commission, "with a view to ensuring the observance of the Convention and the maximum enjoyment of the rights guaranteed by it," a majority of the Commission had decided to express no opinion on the merits of that case. *Id.* 392.

⁸⁹ See PARKER REPORT, *supra* note 13, at 14.

only situation where the Commission could refrain from giving its opinion was when the applicant had withdrawn the complaint or a friendly settlement had been achieved. This was not the case here.⁹⁰

The Commission also considered it relevant, in this regard, that the United Kingdom had allowed very little evidence on the techniques with the result that the Commission knew nothing about what action, other than payment of compensation, had been taken to deal with the practice or what further measures as to this practice were in fact adopted by the authorities.⁹¹

Examining three cases illustrating the five techniques the Commission was of the opinion that the techniques used in combination amounted to "a modern system of torture falling into the same category as those systems which had been applied in previous times as a means of obtaining information and confessions." Such a system was in breach of Article 3 of the Convention not only as inhuman and degrading treatment, but also as torture.⁹² Furthermore, the combined application of the five techniques as applied in the cases mentioned in the Compton Report, and not merely the illustrative cases examined, constituted the clearest form of "practice" in breach of Article 3, since they had been admittedly authorized by the U.K. Government.⁹³

The Commission made it clear that it was the sensory deprivation aspect of the five techniques that gave them the character of torture.

Compared with inhuman treatment discussed earlier, . . . the stress caused by the application of the five techniques is not only different in degree. The combined application of methods which prevent the use of the senses, especially the eyes and the ears, directly affects the personality physically and mentally. The will to resist or to give in cannot, under such conditions, be formed with any degree of independence. Those most firmly resistant might give in at an early stage when subjected to this sophisticated method to break or even eliminate the will.⁹⁴

In this connection particular attention was paid to a proposal in 1948 from the U.K. delegate to the Consultative Assembly of the Council of Europe to amend the Convention on Human Rights. The amendment

⁹⁰ ECHR REP., *supra* note 1, at 394.

⁹¹ *Id.* 395. The sound common sense of this view is borne out by the admission of the Ministry of Defense that a center for the teaching of the five techniques is still in operation. *Supra* note 17.

⁹² ECHR REP., *supra* note 1, at 402. Due to a conflict in the medical testimony, the Commission was unable to establish the degree of psychiatric after-effects. *Id.* 398. Since the Commission's Report, the long term psychiatric effects of sensory deprivation techniques has been confirmed by continuing research on the "hooded" men. See 71 NEW SCIENTIST 272-75 (1976).

⁹³ ECHR REP., *supra* note 1, at 393. The Commission noted that delegates were not able to hear evidence from the security forces who had been present at the interrogation center and that all of the witnesses at Sola were instructed not to reply to any questions regarding the five techniques. There was also an embargo on evidence relating to a "seminar" held in Northern Ireland by the English Intelligence Centre to teach the techniques to the RUC. *Id.* 396.

⁹⁴ *Id.* 402.

read:

In particular no person shall be subjected to any form of mutilation or sterilization or to any form of torture or beating. Nor shall he be forced to take drugs nor shall they be administered to him without his knowledge and consent. Nor shall he be subjected to imprisonment with such an excess of light, darkness, noise, or silence as to cause mental suffering.⁹⁵

The amendment was withdrawn because it was felt that in substance it was already covered by the wording in Article 3. Nonetheless there was agreement in the Assembly that the elements in the amendment were to be read into the Convention.⁹⁶

The Commission also interpreted Article 3 in the light of various provisions in the Geneva Conventions of 1949, although it was stated to be clear that the "main provisions" of these Conventions were not directly applicable to the detainees in Northern Ireland. This raises the question, not specifically examined in the Report, of the applicability of Common Article 3 to the Northern Ireland situation.⁹⁷ Is the conflict in Northern Ireland an "armed conflict not of an international character" for purposes of Common Article 3? Given the evidence of a guerrilla force with political aims, a minimum level of organization, and a sizable number of victims, the point is at least arguable.⁹⁸ The significance of the point lies in Articles 146 and 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949. Article 146 provides in part;

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention. . . .

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. . . .⁹⁹

Article 147 provides examples of "grave breaches," which include "wilful killing, torture or inhuman treatment . . ."

⁹⁵ See 1 COUNCIL OF EUROPE, COLLECTED EDITION OF THE "TRAVAUX PREPARATOIRES" 116-17 (1975).

⁹⁶ ECHR REP., *supra* note 1, at 401.

⁹⁷ While the Commission did express a view that the Common Article 3 of the Geneva Conventions was not directly applicable, the point was not discussed and reasons were not given. *Id.* 379.

⁹⁸ For a discussion of the applicability of the Common Article 3 to the Northern Ireland situation, see HULL, *supra* note 10, at 159-97. The United Kingdom refused to acknowledge that it was under any obligation to apply Article 3 in the Cyprus, Kenya, and Malaya conflicts. See THE INTERNATIONAL REGULATION OF CIVIL WARS 169, 183 (Luard ed. 1971). See also Veuthey, *Some Problems of Humanitarian Law in Noninternational Conflicts and Guerrilla Warfare*, in A TREATISE ON INTERNATIONAL CRIMINAL LAW, *supra* note 85, at 422. For purposes of the five techniques, the relevant issue would be whether a conflict of a noninternational character existed in 1971.

⁹⁹ *Supra* note 14.

Although the Report does not make it clear which official or what government department authorized the use of sensory deprivation techniques, it is clear by admission that they were authorized at the highest level of government.

APPLICATION OF THE CONCEPT OF ADMINISTRATIVE PRACTICE

The problem of proof did not arise in relation to the five techniques because the U.K. Government had admitted their use. However, in relation to all the other illustrative cases examined by the Commission, the government contested the facts. The Commission affirmed their ruling in the *Greek* case that the burden on the Irish Government was to prove its case beyond reasonable doubt which meant "[n]ot a doubt based on a merely theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be given drawn from the facts presented."¹⁰⁰

However, the Commission did not accept the argument from the U.K. Government that in order to disprove the allegations made by witnesses, it would be sufficient for them to point to other possible causes of the injuries, given that the main burden of proof lay with the Irish Government. Instead the Commission took the view that, where the victims were in the custody of the security forces at the relevant times, it fell to the U.K. Government to rebut evidence given by the victims themselves and supported by medical evidence.¹⁰¹ Furthermore, in assessing the value of evidence from security forces and victims the Commission stressed the fact that they were not independent witnesses in the classic sense, since most of them had a clear personal interest in the case.¹⁰² On the one hand, it was noted that not one single security force witness either admitted to having done anything improper himself or stated that he had seen or heard anybody else do anything improper. The Commission looked to factors inherent in the situation to explain this.

They belonged to the group of persons being accused of having inflicted bodily harm, sometimes even severe bodily harm, on prisoners or having been involved in such acts. They therefore reacted before the Delegates as if they were charged with a criminal offence, even when no specific allegations had been made against them personally. Particularly in a situation where, as in Northern Ireland, the security forces are confronted with civil-war-like conditions, it seems that a great sense of solidarity must prevail between the individual members of the police or of the army. That must be considered to be a natural impediment to personal admissions or to statements incriminating colleagues.¹⁰³

¹⁰⁰ ECHR REP., *supra* note 1, at 404, quoting ECHR GREEK REP., *supra* note 40, at 196. Contrast with the burden of proof at the admissibility state. In these inter-state cases the burden is to provide "substantial evidence; in individual applications the burden seems only to be to provide a "prima facie" case. See *Donnelly v. United Kingdom*, *supra* note 81, at 16 YEARBOOK 148.

¹⁰¹ ECHR REP., *supra* note 1, at 405.

¹⁰² *Id.* 404-05.

¹⁰³ *Id.*

On the other hand, counterbalancing factors tainted the evidence of the victims. In addition to the point that many of the witnesses had been interned and were therefore eager to establish a case against the security forces, the Commission took note of a propaganda campaign to discredit the security forces within the Republican community. In the light of these evidential considerations, the importance of objective medical testimony was underlined.¹⁰⁴

On the issue of how the Commission should approach examination of the remaining evidence, especially as regards the question of a practice, both parties differed substantially. The Irish Government took the view that the Commission should draw inferences from the failure on the part of the U.K. Government to produce certain evidence and regard the illustrative cases as representative of many others. Adopting that approach, they argued, provided overwhelming evidence of a practice.¹⁰⁵

The U.K. Government urged the Commission to approach the evidence by examining the various legal forms of protection for detainees as, for example, the regulations for the treatment of prisoners or the machinery for the investigation of complaints.¹⁰⁶ If such an approach were adopted, the Commission could not find the existence of official tolerance and therefore of administrative practice. However, the Commission felt that it should go beyond theoretical forms of protection and should examine the way in which they were applied in practice. For example, they considered it relevant that in none of the illustrative cases had there been anything like a thorough investigation by the authorities of the allegation of ill treatment.¹⁰⁷

The Commission stressed the fact that it was not out to make any finding with regard to the general overall situation from 1971-1974 and that its enquiry related to a very limited part of the emergency, namely the autumn of 1971. In making its findings it examined in detail sixteen illustrative cases, based on facts which occurred in various holding centers throughout Northern Ireland. However, it made it clear that it was prepared to take into consideration, in its determination of whether or not a practice existed, other groups of cases on which submissions had been made but which had not been as thoroughly scrutinized by the Commission.¹⁰⁸

In its examination of the *Palace Barracks* cases, it found, applying the criteria formulated in the *Greek* case, that "inhuman treatment" was established in seven cases.¹⁰⁹ The Commission considered that these cases could not be considered as "torture" because:

... although the violence had been deliberately applied . . . , the evidence obtained does not disclose the application of such premeditated

¹⁰⁴ *Id.* 407.

¹⁰⁵ *Id.* 459.

¹⁰⁶ *Id.* 264-71.

¹⁰⁷ *Id.* 459. See also ECHR GREEK REP., *supra* note 40, at 196.

¹⁰⁸ ECHR REP., *supra* note 1, at 459.

¹⁰⁹ *Id.* 463. Most of these cases consisted of very severe beatings with fists, boots, and batons, all medically attested. *Id.* 414-48.

methods or techniques in the infliction of the ill-treatment or to such a degree as would be required in the opinion of the commission to describe the treatment as torture.¹¹⁰

The Commission also found that, in the autumn of 1971, an administrative practice of "inhuman treatment" existed at Palace Barracks, stating that, in determining whether a repetition of acts exists, the question is not whether the number of acts is large but mainly whether the cases are so related to others "that they appear not as isolated events but as expressing tendencies or patterns."¹¹¹

From the cases examined in respect of Palace Barracks, sufficient similarity existed in the methods of treatment for the Commission to conclude that repetition, in this sense, existed. Also, in examining the question whether "official tolerance" of ill treatment was shown, the Commission looked for knowledge on the part of the superior officers of those who committed the acts and for action which was taken that might have prevented their occurrence or repetition. In relation to immediate supervisory officers, the Commission inferred their knowledge of ill treatment from the fact that they saw all the detainees on leaving the interrogation center. These officers were held to have tolerated this ill treatment by their failure either to report incidents to superiors or to carry out investigations themselves or to exclude certain special officers from interrogation.¹¹² Furthermore, the Commission also found "tolerance" of ill treatment by the highest authorities of the RUC. They must have known about allegations of ill treatment because of the general security situation, which created a likelihood that it would occur, and because the allegations were well publicized. However, despite these allegations, not only were proper police investigations not carried out in the autumn of 1971 but no attempt was made either to make it clear who was ultimately responsible for ill treatment or to issue special instructions with a view to prohibiting and preventing the recurrence of ill treatment.¹¹³ This factor weighed particularly heavily with the Commission because the authorized use of the five techniques may have given police officers the impression that a certain measure of mistreatment was justified in the circumstances.¹¹⁴ The Commission, however, stopped short of concluding that the highest authorities in fact authorized the mistreatment.

The approach of the Commission in assessing the evidence of inhuman treatment illustrates the substantial evidentiary difficulties of proving mistreatment in a situation where there is wide scope for political propaganda. The stress on objective medical testimony and the rule that the onus of proof shifts when a victim can establish by medical evidence that he was injured while in the custody of the security forces show that the Commission is very aware of the difficulties involved. These have been well

¹¹⁰ *Id.* 463.

¹¹¹ *Id.* 464.

¹¹² *Id.* 465.

¹¹³ *Id.* 467-68.

¹¹⁴ *Id.* 467.

described in the *First Greek* case:

First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill-treatment by agents of the police or armed services would be carried out as far as possible without witnesses and perhaps without the knowledge of higher authority. Thirdly, where allegations of torture or ill-treatment are made, the authorities, whether the police or armed services or the Ministries concerned, must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence there may be reluctance of higher authority to admit, or allow inquiries to be made into, facts which might show that the allegations are true. Lastly, physical traces of torture or ill-treatment may with lapse of time become unrecognisable, even by medical experts, particularly where the form of torture itself leaves little external marks.¹¹⁵

However, of particular interest, illustrating the necessity to probe even medical testimony, was the evidence of the prison doctor as recounted by the Commission:

Dr. M. saw the prisoners who were brought to Crumlin Road Prison within 24 hours of their arrival and he examined them with a view to determining whether or not they needed any special medical treatment. At least during certain stages of the security operations in Northern Ireland in 1971 the prisoners, in the doctor's own words, "came in not in ones and twos but in quite a number" (VR 6, p. 236). They were given a thorough visual examination, a stethoscope examination of the heart and lungs, and an examination of the hernial orifices, the joints and the stomach, and entries were made in the committal book of the prison. Dr. M. also noted obvious physical injuries and marks but he did not ask the men how they got these injuries nor did anyone, according to him, ever make complaints to him.

As to the attitude of the detainees towards him, Dr. M. explained that "there was a great deal of antagonism towards the official people that were there. These people were not criminals, they were not people who had fallen foul of the law. They were detainees, they felt they should not have been brought in, and they were not, shall we say, as co-operative as they would have been had they gone in to see a doctor" (VR 6, p. 255); "they were—what shall we say—anti the establishment and I was part of the establishment. They resented me and they also objected to my examining them. They did not want to have anything whatsoever to do with us, or with me, and whether I was a doctor or whether I was not, I was just another person in the establishment which they were against and they wanted very little—they had to have this medical examination because they had no option. This was not what was done all along the line" (VR 6, p. 236).

In the Commission's opinion the doctor's own attitude towards the detainees is reflected in his description of their attitude towards him. It is therefore not surprising, taking also into account the large number

¹¹⁵ ECHR GREEK REP., *supra* note 40, at 196.

of people examined by him during that time, and the little space available in the prison entry book for medical findings, that his entries about injuries and marks found on the detainees are not as detailed as medical reports prepared by their own doctors, who had examined the case-witnesses normally at the request of their solicitors or members of their family, in the light of detailed allegations of ill-treatment reported to them by the detainees. Any differences in the medical evidence might thus be explained, including any discrepancies and inconsistencies which will be dealt with in detail in connection with the relevant cases. Dr. M. himself was apparently inclined to explain them in this way.¹¹⁶

Testimony such as this and the strategic role of the doctor as an objective witness of mistreatment again emphasize the importance of an international code of medical ethics in this area.¹¹⁷

DUTY TO SECURE HUMAN RIGHTS

The Irish Government raised an important issue concerning the precise nature of the obligation of states under the Convention. Article 1 provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

In essence the Irish Government argued that Article 1 could be violated independently from any other article in the Convention and that the administrative practice and violation of Article 3 constituted a violation of Article 1 as well.¹¹⁸ The Irish argument rested on a conception of the nature of conventional obligations. Not only was a state obliged not to violate the rights and freedoms in the Convention, but there was also a reciprocal obligation as between states to ensure that legislative measures and administrative practices conformed to the Convention. This represented an obligation which could be violated independently by a state, in that it did not require the specific violation of a right contained in Section I. For example, it was argued, if legislation were to be enacted which clearly violated Article 7 (freedom from retroactivity of criminal offences), the very existence of that legislation would constitute a violation of Article 1 which any High Contracting Party could refer to the Commission as a breach of the Convention even though the legislation had not yet been applied.¹¹⁹ Thus, in the present case, it was not sufficient under the provisions of Article 1 that people should not be subjected to inhuman or degrading treatment. In addition freedom from such treatment must be secured to them, and they must live with the knowledge of that security.¹²⁰ Accordingly, a violation of a particular right in Section I has a twofold effect. It was both a breach of the article defining the right, as well as

¹¹⁶ ECHR REP., *supra* note 1, at 408.

¹¹⁷ See Declaration of Tokyo of the World Medical Association, Guidelines for Medical Doctors concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment, adopted by 29th World Medical Assembly, Tokyo, Oct. 10, 1975. See also Resolution of the International Council of Nurses, adopted Singapore, August 1975.

¹¹⁸ ECHR REP., *supra* note 1, at 477-80. ¹¹⁹ *Id.* 477.

¹²⁰ *Id.* 478.

proof of a breach of Article 1, since it demonstrated a failure to secure that right.

The U.K. Government challenged this interpretation of the nature of state obligations under the Convention, arguing that it was established by the jurisprudence of the Commission in the case of *Austria v. Italy* and the *First Greek* case that the Convention was designed to secure certain rights and freedoms for persons within the jurisdiction of states.¹²¹ It was not designed to secure reciprocal rights and obligations for states. States did not enforce their own rights; "they referred" to the Commission alleged breaches of the Convention. It followed that the Irish concept of the separate obligations was illusory. The British Government maintained:

Art. 1 of the Convention and the relevant Article of Section I of the Convention could only be read together. The one indicated by and to whom obligations were owed, the other the nature of the obligations. A complaint under Art. 1 was defective if it failed to identify the particular right or freedom alleged to have been violated. But a complaint under one of the Articles of Section I also implied a reference to Art. 1. So long as the particular right or freedom was identified, it made no difference if the complaint was made under Art. 1, a specific Article of Section I, or a combination of the two.¹²²

In dealing with the point that the mere existence of legislation could violate the Convention, the United Kingdom distinguished two different kinds of provision. The first was a provision that, by requiring or inhibiting a particular course of action, had immediate and direct effect. The second was a provision that conferred powers which had to be exercised by some agency in order to have effect—for example, a power to detain which requires an executive act to come into force. The U.K. Government reserved its position on the former provision and felt that a provision of the latter category only violated the Convention when it was made operative.¹²³ The parties agreed that, whatever the approach to Article 1, the allegation must be based on one of the rights contained in Section I.

The Commission decided in a surprisingly brief opinion that Article 1 of the Convention could not be violated separately nor could it be violated in conjunction with other articles.¹²⁴ It had no independent existence; this became clear on examining the French text of Article 1.¹²⁵ The Commission also made it clear that:

In recognising the rights of the Convention to everyone within the jurisdiction the High Contracting Parties made it clear that this treaty by its ratification creates rights of individuals under international law.¹²⁶

On the point whether a state could be in violation of the Convention by virtue of the existence of legislation and not its application, the Com-

¹²¹ *Id.* 481.

¹²² *Id.* 483.

¹²³ *Id.* 482.

¹²⁴ *Id.* 483-85.

¹²⁵ *Id.* 484. The French text reads: "Les Hautes Parties Contractantes reconnaissent à toute personne relevant de leur juridiction les droits et libertés définis au Titre 1 de la présente Convention." COLLECTED TEXTS, *supra* note 31, at 2.

¹²⁶ ECHR REP., *supra* note 1, at 484.

mission observed that an individual in such a case could often claim to be a victim before the law was directly enforced to his detriment. Avoiding a general statement on the problem, the Commission expressed the view that the result depended on the interpretation of Article 25 and the relevant article in Section I which was claimed to be violated.¹²⁷

This decision of the Commission on Article 1 raises fundamental questions relating to the collective guarantee of the Convention by signatory states and the nature of conventional obligations *inter se*. The importance of the issues involved for the enforcement of the Convention can be seen in the four rival interpretations of Article 1 canvassed in the case: first, the Commission's view that Article 1 cannot be violated separately and does not represent a separate obligation as between states; second, the view expressed in a Separate Opinion by Commissioner Ermacora that Article 1 can only be violated independently in regard to state applications, if the breach relates to one of those articles from which no derogation can be made and amounts to "flagrant and massive violations" of human rights;¹²⁸ third, the view expressed in Commissioner Mangan's Dissenting Opinion that a positive duty exists between states to secure human rights, that states can take action against anticipated breaches of the Convention without waiting for a victim to materialize, and that the existence of legislation contrary to the Convention is by itself sufficient to support a state application;¹²⁹ and finally, the views of Commissioners Sperduti and Opsahl that, in addition to an obligation of nonviolation of the rights in the Convention, an obligation also exists towards *all the other states together* to guarantee respect for the Convention, which can be the subject of a separate breach.¹³⁰

The view is still current in some quarters that conventions on human rights do not grant rights directly to individuals but establish mutual obligations of states to grant such rights to individuals.¹³¹ The decision of the Commission on Article 1 establishes beyond all doubt, reaffirming previous decisions, that under the Convention individuals are given direct rights in international law as well as the means of enforcing them under Article 25. Further, in deciding that Article 1 cannot be independently breached, the Commission is being consistent with its previous view of the nature of state obligations expressed in the case of *Austria v. Italy*.

Whereas, therefore in becoming a Party to the Convention, a State undertakes, vis-à-vis the other High Contracting Parties, to secure the rights and freedoms defined in Section I to every person within its jurisdiction, regardless of his or her nationality or status; . . . whereas it follows that the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves. . . .

¹²⁷ *Id.*

¹²⁸ *Id.* 499-500.

¹²⁹ *Id.* 500-02.

¹³⁰ *Id.* 497-99.

¹³¹ See TUNKIN, *supra* note 59, at 83.

[A] High Contracting Party, when it refers an alleged breach of the Convention to the Commission under Article 24, is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe.¹³²

This extract indicates in a way that was not amplified in the Commission's decision that, when a state lodges a complaint under Article 24, it is in reality enforcing the right of aggrieved individuals in international law. In addition the character of the obligation of a state, as Commissioners Sperduti and Opsahl indicate, is an obligation *toward all the other states together*—a concept of collective guarantee.

CONCLUSIONS

At a general level, the Commission's decision in the *Irish* case represents a further stage in the gradual erosion of the concept of domestic jurisdiction and the strengthening of the conceptual basis of the law relating to the international protection of human rights. The Commission has again affirmed, through its thorough and exacting review of state behavior, that in times of national emergency human rights are especially vulnerable and that the need for independent international scrutiny is all the more compelling. This appreciation is strongly reflected in the decision of the Commission that the prohibition of torture is absolute, both under the Convention and international law generally, and further in the willingness of the Commission, in the interests of a developing international law of human rights, to pass judgment on the five techniques even though they were no longer being used.

However, if the decision emphasizes the political potential of the Commission and increases its credibility as an operative guardian of human rights, it also reveals the important limitations on its effectiveness in emergency situations. Notwithstanding regional human rights commitments, states do not appreciate the intervention of outside agencies reviewing the way in which they are dealing with an emergency. The argument is based on expediency and domestic jurisdiction.¹³³ It is evident in the legal submissions in the *Greek* case that the Commission should not review the activities of a revolutionary government;¹³⁴ in the *Lawless* case that once the Commission was satisfied with the bona fides of the state it should accept the legitimacy of derogation under Article 15;¹³⁵ and finally in the present case, that the Commission should only find "official tolerance" if it existed at the level of the state and that it should not review the validity of the officially abandoned five techniques.¹³⁶ The Commission's concept of "margin of appreciation" can be seen as a con-

¹³² *Supra* note 33, 4 YEARBOOK 138-40.

¹³³ See J. E. S. Fawcett, *Human Rights and Domestic Jurisdiction* in THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 286 (E. LUARD ed. 1967).

¹³⁴ ECHR GREEK REP., *supra* note 41, at 31-32.

¹³⁵ Report of the Commission, *supra* note 38, at 77.

¹³⁶ ECHR REP., *supra* note 1, at 391-95.

cession to the domestic jurisdiction approach, albeit based on legitimate policy factors.

However, it must be recognized that human rights complaints based on emergency situations place the Commission in a fundamental dilemma. On the one hand, to perform its functions effectively and strengthen the foundations of the Convention, it is obliged under Article 19 to examine state policy in an emergency objectively and vigorously. On the other hand, due to political reality, the exercise of this function could threaten the progressive development of the norms of the Convention by forcing states to reexamine the basis of their consent under the treaty. In the last resort, a state which was discontented with the interpretation and practice of the Commission in an emergency situation could denounce the Convention under Article 65, as Greece did,¹³⁷ or refuse to recognize the jurisdiction of the Court or to renew the right of individual petition; or, as France has recently done, enter a reservation in respect of Article 15.¹³⁸ The dilemma presents itself in a more acute form when the Commission is dealing with an emergency within a democratic state, as in the present case, by contrast with an emergency claimed by a dictatorship. It could also be said to be a reflection of a larger contradiction, inherent in the entire field of the international protection of human rights, between human rights obligations on the one hand and the concept of domestic jurisdiction on the other.

Two further factors, arising out of the examination of Article 3, illustrate the limitations of the Commission in this area. The limited resources of the Commission meant that it could examine only a small fraction of the complaints made under Article 3. Although the complaints submitted by the Irish Government covered the period from 1971 to 1974, the Commission concentrated mainly on events in the autumn of 1971.¹³⁹ Also, the U.K. Government refused to supply witnesses who had been present at the interrogation center and instructed witnesses not to reply to any questions regarding the five techniques.¹⁴⁰ Furthermore, they refused to submit copies of interrogation records on the basis that they constituted a class of document which it would be injurious to the public interest to disclose. The Commission was not in a position to compel the production of these relevant pieces of evidence, and it glossed over the juridical significance to be attached to such noncooperation. For example, it did not examine the refusal to produce evidence under Article 28 of the Convention nor did it utilize the opportunity to draw an express adverse presumption, although the refusal was used in support of its competence to examine the compatibility of the five techniques with the Convention.¹⁴¹

¹³⁷ 12 YEARBOOK 78 (1969).

¹³⁸ 17 YEARBOOK 4 (1974). See also Zanghi, *supra* note 31, at 8.

¹³⁹ ECHR REP., *supra* note 1, at 461. ¹⁴⁰ *Id.*

¹⁴¹ Article 28(a) states:

In the event of the Commission accepting a petition referred to it:

(a) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned *shall furnish all necessary facilities*, after an exchange of views with the Commission.

The Irish Government has availed itself of its right to refer the case to the European Court of Human Rights, where the issues relating to Article 3 and Article 1 will merit particular attention.¹⁴² However, the Report of the Commission, in its attempt to clarify the law relating to the protection of human rights in an emergency situation, will have lasting influence, transcending the borders of Northern Ireland, Ireland, and the United Kingdom. For the Commission has been not only interpreting the European Convention but developing the general international law of torture and inhuman and degrading treatment embodied in a growing corpus of international instruments and national regulations.¹⁴³ In so doing, the Commission has given an extra dimension to the concept of the public order of Europe but, more important, has again focused attention on existing national procedures for dealing with torture and the need, in both national and international law, for a more creative approach toward its elimination.

Emphasis added. See also Commissioner Mangan's Separate Opinion, ECHR REP., *supra* note 1, at 492.

¹⁴² This is the first interstate case to go to the Court. The first stage of the oral proceedings, held from February 7 to 9, 1977, was limited to questions concerning "(i) the scope and exercise of the jurisdiction of the Court . . .; (ii) the role of the Court as regards an enquiry into the facts and the procedure followed by the Commission; and (iii) the interpretation of Article 1 of the Convention." Council of Europe, Press Release No. C (77) 1, January 1, 1977. On February 11, the President of the Court announced that the Court had decided, *inter alia*, (i) that it was not precluded from "pronouncing on the non-contested allegations of violations of Article 3" and that it had "sufficient information and materials" to enable it to do so; (ii) that it had "jurisdiction to take cognisance of the other contested cases of violation of Article 3," if the Irish Government puts them forward "as establishing the existence of a practice;" and (iii) that it did not have jurisdiction "to rule on the correctness of the procedure followed by the Commission" in hearing certain witnesses, but "that it is empowered to assess the relevance and probative value of the evidence so obtained." Council of Europe, Press Release No. C (77) 5, February 15, 1977. The second part of the oral proceedings began on April 22, 1977. Council of Europe, Press Release No. C (77) 16, April 12, 1977.

¹⁴³ UN Covenant on Civil and Political Rights, Art. 7, *supra* note 62; Inter-American Convention on Human Rights, Art. 5, *supra* note 63; UN Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 56. See also G.A. Res. 3059. 28 GAOR, Supp. (No. 30, I) 73, UN Doc. A/9030 (1973); G.A. Res. 3218. 29 GAOR, Supp. (No. 31, II) 82, UN Doc. A/9631 (1974); and G.A. Res. 3218. 30 GAOR, Supp. (No. 34) 92, UN Doc. A/10034 (1975).

REMOTE SENSING BY SATELLITE: WHAT FUTURE FOR AN INTERNATIONAL REGIME?

*By Hamilton DeSaussure **

The combined forces of science and technology have been perfecting a new means of data acquisition which has gone largely unnoticed by the average citizen—a technique so profound in its implications for the improvement of the environment and for the allocation and conservation of natural and human resources that it has been compared to the microscope in its significance and achievement. This new technique is the viewing of the earth's surface and its surrounding environment by means of sensing devices affixed to a platform orbiting the earth from the near reaches of outer space. Remote sensing by satellite (RSS) has been defined by the UN Working Group on Remote Sensing as a methodology to assist in characterizing the nature and conditions of the natural resources, the natural features and phenomena, and the environment of the earth by means of observation and measurements from space platforms.¹

Remote sensing may become the eye of mankind through which heretofore untapped data about our planet can be acquired and assessed, providing greater predictability in the location of our natural resources, in assessing future trends, in planning for population growth, and in conserving world resources. The sensing devices on board the space platform can be compared to the lens of the eye. The transfer of data received through the lens to ground stations is like the optic nerve, and the processing and analysis of the acquired data at the stations on earth performs the function of the brain. One scientist pointed out that the eye has greater limitations than remote sensing by satellite, since the eye is limited to the visible region of the spectrum in real time with no replay.² Each of us uses optical remote sensing for 95% of our decisionmaking. As in the case of human experience, there are essentially four stages to the decisionmaking procedure for remote sensing by satellite—acquisition of data, processing, distribution, and analysis of the printout.³ The satellite performs a function in the first of these phases.

Remote sensing by satellite has already immeasurably aided planners and policymakers in the identification and correction of some of the problems which stem from overpopulation, resource depletion, and environ-

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¹ UN Doc. A/AC.105/111, at 2 (Feb. 14, 1973).

² Mooneyhan, *All You Ever Wanted to Know About Remote Sensing*, 2-A NASA EARTH RESOURCES SYMPOSIUM 11 (Houston, Texas, June 1975).

³ UN Doc. A/AC.105/195, at 9 (March 1, 1977).

mental deterioration.⁴ As the eye always has been, remote sensing techniques are rapidly becoming an integral part of the decisionmaking process for man. By surveying our human and cultural resources, identifying crop and plant disease and urban blight, and establishing trends for better land use and marine conservation, this technique provides vast outpouring of information for national, regional, and local planners concerned with research, development, and programming for a better social and economic order. Planners at the state and local levels have been enthusiastic about the value of information derived from RSS. The opinion expressed is generally uniform that the program should be operational, as well as expanded, in the second generation of these earth-orbiting satellites.⁵

At least until 1977, the United States was the only country with a comprehensive and public remote sensing program. The United States launched its first earth resources' technology satellite (ERTS) on July 23, 1972. It was redesignated Landsat in 1975 to create more public awareness of this program. A second earth satellite, Landsat II, was launched in January, 1975. Landsat C is planned for launch in late 1977 or early 1978. A fourth Landsat is planned for the first quarter of 1981, but is subject to congressional approval.⁶ Dr. James Fletcher, the former Administrator of NASA, has testified that the fourth Landsat will generate ten times the information content of the first generation satellites and is being designed to function in outer space for three years.⁷ It may mark the beginning of the second generation of such satellites but it is not likely to be designated by NASA as operational.

The present satellites have been designated as experimental since their prime mission has been to test this new technology and to determine what types of data concerning our natural and cultural resources can best be acquired by earth orbiting satellites. The experimental satellites have also been launched to determine the economic, social, and cultural value of repetitive, synoptic, multispectral scanning for commercial and scientific use.⁸ NASA officials have suggested the experimental designation of the first generation of earth satellites will have forestalled objections by foreign nations that might object to an operational system.⁹

Landsat imagery is acquired from two types of earth sensing systems; a three-band return beam Vidicon and a four-band multispectral scanner.

⁴ BATTELLE LABORATORIES RESEARCH REPORT, SURVEY OF USERS OF EARTH RESOURCES-REMOTE SENSING DATA 51, 70, 96 (1976) [hereinafter BATTELLE . . . SURVEY].

⁵ In Ohio for example, Landsat data will be used for recreational land use planning, flood plain management, and strip-mine reclamation monitoring. In Alabama, it will be used for monitoring and predicting water quality degradation. Governor Andrus of Idaho decided in late 1976 to establish a state funded operational capability to use Landsat data in managing the state's resources. Statement of Bradford Johnston, Associate Administrator for Applications, NASA, *Hearings Before the Sub-comm. on Science and Space of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess. 3 (March 3, 1977).

⁶ *Id.* 2.

⁷ *Id.* 6 (Feb. 25, 1977).

⁸ *Id.*

⁹ E. Galloway, *Earth Resource Satellites: Hearings Before the Senate Comm. on Aeronautical and Space Sciences*, 93rd Cong., 2d Sess., 292, 293 (1974).

The present systems detect reflection and also pick up signals transmitted from prepositioned data collection platforms while Landsat C will also detect earth-generated radiation. The data acquired by the satellites are transmitted to ground receiving stations almost instantaneously or are recorded on tape for later transmission.¹⁰ There are five receiving ground stations in the North American continent, three of which are in the United States and two in Canada. There are other receiving stations in Brazil and Italy. Stations are under construction or in development in several countries, including Iran, Zaire, Chile, and Argentina.¹¹ Information transmitted to the three U.S. stations at Fairbanks, Alaska; Goldstone, California; and Greenbelt, Maryland, is retransmitted to the Earth Resources Observation Systems (EROS) Data Center at Sioux Falls, South Dakota, for storage and public distribution. Satellite imagery from anywhere in the world, including the Soviet Union and China, can be purchased from EROS by anyone with money to buy it, and no international agreement with any foreign state is required.¹² The cost of the imagery is very small, amounting only to the cost of reproduction. Each individual image is called a scene and represents an area approximately 185 kilometers square. The smallest identifiable area within any scene is presently about 60-80 meters square. While such resolution is yet too coarse to satisfy any requirements for information of detail, it does benefit cartographers, geologists, meteorologists, hydrologists, agriculturists, geographers, and a host of other experts who need broad-area, repetitive, multispectral, ground coverage. Each of the two U.S. Landsats circles the earth fourteen times a day at an altitude of 500 nautical miles, in a near circular, near polar orbit, designed to coordinate with the sun and the earth for maximum spectral and light intensity information.¹³ Approximately 200 scenes are recorded and transmitted daily by the two operations. Each Landsat covers all portions of the globe, except for the polar regions, every eighteen days so that together they provide complete coverage of the earth's surface every nine days.¹⁴

Landsat I has now been in orbit for five years and Landsat II for more than two. During a four-year period from 1973 through 1976, the number of Landsat frames sold to all users rose from 81,000 to 280,000. The dollar volume spent in this period by all users for Landsat data rose from \$241,000 to over one and one half million dollars.¹⁵

¹⁰ Bernstein & Stierhoff, *Precision Processing of Earth Image Data*, 64 AMER. SCIENTIST 500-08 (1976).

¹¹ Statement by Stephen Doyle, U.S. Representative to the Scientific and Technical Sub-Comm. of the UN Committee on the Peaceful Uses of Outer Space (COPUOS), Press Release USUN W-8 (77) (Feb. 18, 1977).

¹² Information from the Librarian, EROS Systems Data Center, Sioux Falls, South Dakota (March 2, 1977). See also Pamphlet, EROS Data Center, U.S. Dept. of the Interior, Geological Survey (USGS Inf.-74-43).

¹³ Bernstein & Stierhoff, *supra* note 10, at 501.

¹⁴ *Id.* at 503. See also Doyle, *Remote Sensing by Satellite* in N. MATTE & H. DE-SSAURE, *LEGAL IMPLICATIONS OF REMOTE SENSING FROM OUTER SPACE* 67 (1976).

¹⁵ BATTELLE . . . SURVEY, *supra* note 4, at 17. A substantial amount of earth photog-

As user demand grows for Landsat-procured data, the information it provides is bringing considerably more detail to industrial and other users. It is probable that the degree of resolution that can be provided by such surveys within the next decade can be refined from 80 meters to 10 meters square.

It is this very prospect of more graphic illumination of the earth's surface and the demand for it that have placed a range of new legal problems and concepts on the lawyer's horizon.

How is this activity presently governed by the Outer Space Treaty and by general international law? What should be the defined limits for remote sensing activity? Is sovereignty infringed by the sensing and distribution of data about resources within the subjacent state without the permission of that state? Do states have a right to forbid or control the sensing of their territory? Do they have a right to object to the distribution of data about their territory to third states? Do they have a prior right to receive and analyze this data prior to distribution to a third party? Is the data generated by remote sensing satellite or the information derived from this data subject to individual proprietary rights? Does remote sensing constitute an invasion of privacy, either at the sovereign or individual level? Should special rules be applicable to remote sensing in national border areas or nationally declared restricted zones? Do ground receiving stations which collect data about the territory of adjacent countries have any special obligations toward those neighbors? Should data access be placed under international control? Should there be one central international data bank for the collection, storage, and processing of all acquired data? Is a multilateral treaty necessary or desirable to provide for the regulation of remote sensing activity?

Foremost is the question whether and how the Outer Space Treaty of 1967 regulates this activity.¹⁶ Article I refers to *use* as well as *exploration* of outer space. Earth-orbiting satellites are certainly a use and, therefore, an activity covered by the treaty. It would be unrealistic and artificial to create any distinction between earth-oriented and other space activities, and such a distinction would raise many new problems of definition. Yet the treaty only provides very general guidelines as to how this activity may be performed and what, if any, limitations must be imposed for the benefit of sovereign and individual rights. The treaty provides for freedom of scientific investigation in outer space and that activities in outer space shall be carried on in accordance with international law, including the UN Charter.¹⁷ The treaty also provides that exploration and use of outer

raphy and imaging was done in the NASA Skylab program (1973-75) with some high resolution photography having a resolution of 17 meters. Letter to the author from S. Doyle, Deputy Assistant Administrator for International Affairs, NASA (May 27, 1977).

¹⁶ Treaty of Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies. 18 UST 2410, TIAS No. 6347, 61 AJIL 644 (1967) *done* Jan. 27, 1967.

¹⁷ Arts. I & III.

space shall be guided by the principles of cooperation and mutual assistance, that the registry state of satellites shall retain jurisdiction and control over its spaceborne objects, and that each state is internationally liable for damage caused by its space objects.¹⁸ These general rules do not reach the heart of the controversy as to the permissible scope of earth resources sensing from outer space. Two themes recurring in UN pronouncements have been cited as the basic principles of international law applicable to remote sensing from outer space. Unfortunately, these two themes have lead to inconsistent conclusions as to the proper framework for remote sensing operations. The first theme, proclaimed in a series of resolutions of the UN General Assembly, is that peoples and nations have a right to permanent sovereignty over their natural wealth and resources and that this right must be exercised in the interest of the national development and well being of the peoples concerned.¹⁹ Some countries, among them Argentina and Brazil, have declared that this permanent sovereignty embraces more than the physical or material wealth within state frontiers and extends to information about such wealth as well. It is argued that it is an intrusion on this sovereignty to derive data which produces information as to territorial resources through unrestricted sensing activity.²⁰

The other recurring theme is contained in both the UN Charter, and in the Universal Declaration of Human Rights.²¹ Article 1 of the Charter provides for the promotion and encouragement of respect for human rights and for the fundamental freedoms for all, without distinction. Article 19 of the Universal Declaration of Human Rights provides that everyone has the right to "seek, receive and impart information and ideas through any media and regardless of frontiers."²²

The themes of permanent sovereignty and freedom of information can be harmonized by examining the applicable principles of international law as they apply on earth and to the terrestrial environment. Airspace is the immediately subjacent continuum to the outer space and presents some parallels to that of outer space. Aerial surveillance is similar to remote sensing from outer space in a number of respects. Each provides an overhead view of the subject, the earth. Each can penetrate every corner of the globe without the normal obstructions and hazards of earthbound vehicles and vessels. Each can perform repetitive, and in varying degrees, synoptic coverage of the earth's surface. Both techniques are complemen-

¹⁸ Arts. VII, VIII, & X.

¹⁹ See, e.g., GA Res. 626, 7 GAOR, Supp. (No. 20) 18, UN Doc. A/2361 (1952) (United States voted against); GA Res. 1803, 17 GAOR, Supp. (No. 17) 15, UN Doc. A/5217 (1962) (Vote: 97 in favor, 2 opposed, 12 abstentions, United States voted in favor); GA Res. 2158, 21 GAOR, Supp. (No. 16) 29, UN Doc. A/6316 (1966) (Vote: 104 in favor, 6 abstentions, United States abstained).

²⁰ See statement of the Brazilian delegate to the COPUOS Legal Sub-Committee, 13th Sess., UN Doc. A/AC.105/C.2/SR.220, at 86 (May 27, 1974); statement of the USSR delegate, *id.* at 98; statement of the Czechoslovakian delegate, *id.* at 99.

²¹ GA Res. 217, UN Doc. A/810, at 71 (1948).

²² See also International Covenant on Civil and Political Rights, GA Res. 2220A, 21 GAOR, Supp. (No. 16) 52, UN Doc. A/6316 (1966).

tary in that the one augments the other. In this regard, the Earth Resources Observation System Data Center at Sioux Falls is the repository for both high altitude photography and Landsat data. However, the legal regime for the two activities is quite different. As already mentioned, outer space is free for use by all states without discrimination. By contrast, the legal regime in airspace is closed and highly compartmentalized. The United States and most other airfaring nations of the world are parties to the Chicago Convention of 1944 on International Civil Aviation.²³ Article I of that Convention recognizes that all states, not just contracting states, have complete and exclusive sovereignty over their own airspace. As early as 1906, a distinguished French jurist, Paul Fauchille, advocated freedom of navigation in airspace. However, Fauchille considered aerial photography to be the greatest threat from the airspace to national security. He therefore proposed that the airspace to a height of 4500 feet be subject to the exclusive sovereignty of the subjacent state.²⁴ At that time, this altitude represented the outward limit of photographic capability. In World War I, neutral states closed their airspace to belligerent aircraft.²⁵ Immediately after World War I, in 1919, the first International Air Navigation Convention was concluded at Paris and ratified by many of the European states. It recognized the right of every state to control the use of its own airspace.²⁶

The Chicago Convention provides that each contracting state may prohibit or regulate the use of photography from aircraft over its territory.²⁷ The domestic legislation of many sovereign states has implemented and extended this provision. French law provides that a permit must be obtained for commercial or professional aerial photography.²⁸ Similar provisions are in the air laws of Spain, Italy, and England.²⁹ The West German Air Navigation Act provides that permission must be granted to take aerial photography from aircraft other than those engaged in scheduled services.³⁰ This prohibition against the unrestricted use of aerial photography even extends to the drawings and representations made therefrom. Moreover, German laws regulating aerial photography have extraterritorial reach. They are not limited to this activity in German airspace, but extend to adjacent airspace, sovereign or international, when the effect of the photography is to take pictures of German territory which activity en-

²³ Convention on International Civil Aviation. 61 Stat. 1180, TIAS No. 1591, 15 UNTS 295, done Dec. 7, 1944.

²⁴ Fauchille, *Régime Juridique des Aérostats*, 21 ANN. DE L'INSTITUT DE DROIT INTERNATIONAL 296 (1906).

²⁵ J. SPAIGHT, AIR POWER AND WAR RIGHTS 420 (3d ed. 1947).

²⁶ 11 LNTS 173.

²⁷ *Supra* note 35, Art. 36.

²⁸ French Code of Civil and Commercial Aviation of 1955, Art. 28, Transportation and use of photographic equipment may be prohibited by ministerial order. Done by arrêt of April 20, 1926, modified by arrêt of April 28, 1937.

²⁹ As to the United Kingdom, see Air Navigation Order 1976, STAT. INST. 1976 No. 1783, §78. SHAWCROSS & BEAUMONT, AIR LAW C-473 (4th ed. 1977).

³⁰ German Air Navigation Act, Art. 27(2), as amended Nov. 4, 1968.

dangers the security of the Federal Republic.³¹ The German criminal code is so phrased that it extends to peripheral surveillance or photography from outside German airspace of objects and conditions inside German territory.

The German Air Navigation Act defines aircraft as not only airplanes, helicopters, and other like devices, but also *spacecraft*, rockets, and similar flying objects while in the airspace.³² Orbiting satellites are not in use in the airspace, but the space shuttle can be used in either airspace or outer space and will have remote sensing equipment on board. Dr. James Fletcher, Administrator of NASA, testified recently before Congress that the space shuttle, which is scheduled to become operational in the 1980's, will make space flight "nearly as routine in the near future as aviation has become in the near past."³³ No agreement has been reached on the upward extent of airspace.³⁴ When the space shuttle is operating in airspace, however, it will be subject to domestic law, such as the German Air Navigation Act. If Dr. Fletcher's prediction proves accurate and remote sensing instrumentation becomes an established appendage to the space shuttle, at what altitude may it turn on its remote sensing equipment and when must it be shut down? At present no one knows. Furthermore, if a state finds it necessary for economic, political, or security reasons to regulate photography taken at 90 miles above their territory, does the threat disappear at earth orbital heights? The error of Fauchille in seeking to establish a protective zone of 4500 feet altitude demonstrated the fallacy of trying to make static determinations in an age of rapidly expanding technology. By a simple amendment to the German Air Navigation Act in 1965, aircraft were deemed to include spacecraft, at least while in the airspace. Could another simple amendment to German air laws extend the airspace to a height of 525 miles which is the present orbital height of Landsat? If it is lawful to prohibit aerial photography from the sovereign airspace of *another* state when the object is to photograph across borders, the extension of the same law to outer space subject to no state's sovereignty may also be lawful.³⁵

Earth resource satellites are oriented toward civilian needs. They do not constitute a threat per se to a subjacent state's national security. Neither should they pose any threat to a state's political security. They

³¹ *Strafgesetzbuch* (St GB) (German Criminal Code) Art. 109g(2), as amended by the Law of July 25, 1964, *Bundesgesetzblatt* (BGBl) I.S. 529 (1964).

³² German Air Navigation Act, *supra* note 30, Art. 1(2).

³³ *Supra* note 7, at 3.

³⁴ For a discussion of the various theses as to the boundary between airspace and outer space, see synoptic table of proposals, UN Doc. A/AC.105/C.2/7 (May 7, 1970) and UN Doc. A/AC.105/C.2/SR. 279 (April 4, 1977). See also S. LAY & H. TAUBENFELD, *THE LAW RELATING TO ACTIVITIES OF MAN IN SPACE* 39-48 (1970).

³⁵ Many states, including the United States, believe peripheral surveillance conducted from international airspace or from the high seas is permissible under international law. See U.S. Air Force Pamphlet 110-31, at 2-6, para. 2-5e (Nov. 19, 1976):

It is common practice for military aircraft to fly in international airspace adjacent to the national airspace of other states for purposes of photographing and otherwise observing activities within the national airspace or territory.

do not function as a means of direct communication to individuals or groups as does a direct broadcasting satellite. Further, the purpose of earth resource satellites is to uncover more facts, not to disseminate opinions. Direct broadcasting by satellites will, like their earthbound counterparts, intertwine fact and opinion by the very nature of the activity.³⁶

Even though fact-gathering is politically a neutral activity, earth resource satellites are often perceived as an economic threat, because of the satellite's potential for providing economically useful data to other states. Such data may provide information which is closely held by the subjacent state and not subject to public access. A state's resources, its population distribution, and the level of its activities may be sensitive information. One noted space lawyer and technical expert has suggested one way in which information derived through remote sensing may be utilized to the detriment of the subjacent state. He suggested a situation where a state's economy might depend heavily upon the sale of a certain agricultural commodity on the world market. If the existence of an oversupply of that commodity became worldwide knowledge, it could produce an undesirable effect on prices.³⁷ On the other hand, worldwide knowledge of an abnormally small supply might equally affect prices and divert customers to the disadvantage of the sensed state. The effect of the sale of grain to the Soviet Union four years ago was to drive up the price of grain in the United States. At the same time, there was apparently no critical shortage of wheat in the Soviet Union, since the grain purchased from the United States was partly sold to Third World countries at a profit. Had the data and analyzed information derived from remote sensing been available then, it could have shown there was no shortfall of wheat production in the Soviet Union and that the sale of grain, which turned out to be a disaster to the American consumer and farmer alike, could have been avoided.

Information on mineral resources can also be legally troublesome as the technology of remote sensing from outer space becomes more advanced. Already data derived through remote sensing by satellite have led field expeditions in Pakistan to new and hitherto undiscovered areas of copper ore. Geologists have compared the spectral signature of known areas of copper porphyries with the profile data of other possible areas. By the computer processing of data derived from a particular region in Pakistan, twenty-seven new possible locations of copper were identified. Ground examination proved five of these sites to possess excellent prospects for copper deposits.³⁸ Obviously, such information in the hands of the trained

³⁶ The problem of unauthorized or pirate broadcasts from the high seas or from airspace prompted the European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories of January 22, 1965, 634 UNTS 239. That agreement refers to broadcast stations installed on board ships, aircraft, and other floating or airborne objects (Art. 1). The agreement does not cover spaceborne objects.

³⁷ Pikus, *Possibility of Technical Control Over Resource Surveying from Space*, INT. INST. OF SPACE LAW OF THE INT. ASTRONAUTICAL FED., PROCS. 16th COLLOQUIUM ON THE LAW OF OUTER SPACE 147 (Baku, USSR, Oct. 7-13, 1973).

³⁸ Schmidt, Clark, & Bernstein, *A Search for Sulfide Bearing Areas*, 2-A NASA EARTH RESOURCES SYMPOSIUM, *supra* note 2, at 116-17.

analyst could provide great bargaining leverage in the negotiation of exploration and survey rights.

Prospecting for natural resources by geophysical methods has become a major activity of the large oil, mining, and gas companies.³⁹ U.S. courts now recognize that prospecting for geological information by survey is a valuable right which belongs to the landowner. The five principal methods of ground exploration are seismic, magnetic, electrical, gravitational, and radioactive.⁴⁰ Geologists agree that remote sensing by satellite cannot directly identify the location of mineral resource locations, in the absence of some surface indications, but they also agree that satellite-derived data enhances surface prospecting.⁴¹ The synoptic repetitive coverage afforded by remote sensing imagery has provided oil and mineral exploration companies with geophysical information of considerable value, and Landsat D will reveal even more information about the earth's surface.⁴²

Seven hundred users of earth resources data were queried a year ago by the Battelle Memorial Institute at the request of NASA. Their survey showed the largest single user group to be industry.⁴³ Within industry, geological and mineral companies were the largest single category.⁴⁴ While many countries openly publish geological and mineral survey maps and have done so for the past 100 years, information derived from earth-orbiting satellites provides significant information in aid of exploration, not shown on such maps.⁴⁵ The copper explorations in Pakistan and the enthusiastic endorsement of remote sensing by satellite by the mineral and oil companies attest to this fact. Furthermore, analysis of geological and mineral maps does not require the same level of expertise demanded for interpretation of data acquired by remote sensing techniques. The Landsat data available from EROS have no more value to the unskilled landowner than would his eye without an optic nerve.

Several U.S. courts have held that the right to explore for oil and minerals is a legally protected property right and belongs to the owner of the soil

³⁹ See generally, 67 ALR 2d 444 (1959). Recovery for Unauthorized Geophysical or Seismograph Exploration or Survey.

⁴⁰ Morley, *Remote Sensing Satellites, What Do They Measure?* in MATTE & DESAUSURE, *supra* note 14, at 15.

⁴¹ Schmidt, *et al.*, *supra* note 38, at 112-21. The USSR has taken multispectral photographs of the earth at an altitude of 250 km. from its orbital station SALYUT-5 to obtain new information about hydrological characteristics of the Volga delta. Professor Bolchakov of the Soviet Union says remote sensing has discovered potential oil-bearing areas. UN DEPT. OF POL. & SEC. AFFAIRS, MONTHLY SURVEY OF SELECTED EVENTS IN THE PEACEFUL EXPLORATION OF OUTER SPACE 10 (Feb. 1977).

⁴² Bradford Johnston, Associate Administrator for NASA for Applications, recently testified before Congress that new instrumentation for remote sensing proposed for early space shuttle/spacelab missions will enhance mineral and petroleum exploration through increased ground resolution, stereo coverage, and color discrimination. *Supra* note 5, at 2.

⁴³ BATTELLE . . . SURVEY, *supra* note 4, at 19.

⁴⁴ *Id.* at 20.

⁴⁵ Schmidt, *et al.*, *supra* note 38, at 120, 121.

until it has been transferred.⁴⁶ Some courts indicate the tort might rest on the theory of unjust enrichment and quasi-contract, not necessarily on trespass to land.⁴⁷ One court noted that the unauthorized surveyor had taken something of value without paying for it, a privilege for which the owner was entitled to be paid.⁴⁸ While the element of trespass is still essential to the tort of unauthorized surveys, remote sensing activity could place this subject in a new light. In one case involving prospecting on adjacent land in order to extrapolate information about the plaintiff's land, a suit was brought for an unauthorized survey. The court held, however, that the mere conducting of a geophysical operation on land adjacent to and in the vicinity of plaintiff's land was not the basis for damages, since there was no trespass or physical injury to plaintiff's land.⁴⁹

Nevertheless, if the philosophy of unjust enrichment is pursued by the courts, it seems likely that enhanced spectral and spatial imagery of sub-jacent land for the beneficial use of oil and mining companies will be balanced by countervailing protection for the unaware and uninformed private landowner.

U.S. courts hold that the term property embraces everything that has exchangeable value.⁵⁰ It does not mean the physical object alone, but the rights over the object and the right to possess, use, and dispose of it.⁵¹ Property, said one court, embraces every interest of sufficient value for judicial recognition.⁵² While it may be doubtful whether any U.S. court would hold that data derived from remote sensing was a taking of a judicially recognizable interest at present, expanding imagery refinement may prompt the courts to reconsider. Stereo viewing, radar, laser, and other instruments of perception will at some point in the advance of the art justify the adoption of a balancing of interests, weighing the landowner's property rights against the geologist's right to extract information.

In a closely related field, remote sensing from earth orbits may have a more direct and foreseeable impact. In the case of *E. I. DuPont v. Christopher*, independent, professional photographers were hired by unknown

⁴⁶ *State v. Evans*, 214 La. 472, 38 So. 2d 140 (1948); *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957); *Tinsley v. Seismic Explorations*, 111 So. 2d 834 (La. Ct. App. 1959).

⁴⁷ See *Shell Petroleum Corp. v. Scully*, 71 F.2d 772 (5th Cir. 1934), and *Picou v. Fohs Oil Co.*, 222 La. 1068, 64 So. 2d 434 (1953). With the possible exception of Louisiana, courts have thus far held that trespass is required to complete the tort of unauthorized surveys. See generally, 67 ALR 2d 444 (1959) and *Tinsley*, *supra* note 46.

⁴⁸ *Shell Petroleum Corp. v. Scully*, *supra* note 47.

⁴⁹ *Kennedy v. General Geophysical Co.*, 213 S.W. 2d 707 (Tex. Civ. App. 1948); see also *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957).

⁵⁰ *York v. Stone*, 178 Wash. 280, 34 P.2d 914 (1934); *State v. Cowen*, 231 Ia. 1117, 3 N.W. 2d 176 (1942); *State v. Ensley*, 240 Ind. 72, 164 N.E. 2d 342 (1960); *Washington Fruit and Produce Co. v. City of Yakima*, 3 Wash. 152, 100 P.2d 8, 13 (1940).

⁵¹ *In re Forsstrom*, 38 P.2d 878 (Sup. Ct. Ariz. 1934); *Gibbes v. National Hospital Service, Inc.*, 24 S.E.2d 513 (Sup. Ct. S.C. 1943); *United States v. Anderson*, 45 F. Supp. 943 (S. D. Cal. 1942); *Lott v. Claussens, Inc.*, 251 S.C. 478, 163 S.E. 2d 615-17 (1968).

⁵² *Washington Fruit and Produce Co. v. City of Yakima*, *supra* note 50.

third parties to take aerial photographs of a partly constructed DuPont plant in Beaumont, Texas.⁵³ The plant was being built by DuPont to produce methanol by secret process. The Federal Court of Appeals for the Fifth Circuit sustained the trial court's position that this constituted wrongful appropriation of trade secrets by aerial surveillance. The case is significant to spaceborne sensing in two ways. First, the court rejected the theory that there must be a trespass to complete the tort. Here the aircraft flew with FAA approval in the airspace above the DuPont factory. Second, the defendants were not the parties who wished this information but were hired by Du Pont's competitors. The court regarded the activity itself as objectionable. Illegal conduct on the ground was not necessary.

A related German case has similar implications. The highest German Civil Court, the Bundesgerichtshof, stated that the photographing of a castle (The Schloss Tegel in Berlin) for commercial purposes without authorization was an actionable infringement.⁵⁴ A photographer had been granted permission to enter the grounds of the castle, but it was not known that he intended to take pictures for the purpose of selling picture postcards. When he did this, the castle owner, who sold her own postcards of the castle, brought an action against the photographer on the basis of an infringement of her property. Liability was established on the basis of unauthorized use of his photographic equipment rather than on trespass. The clear implication of the *Schloss Tegel* and *DuPont* cases is that unauthorized activity, not trespass, is the hallmark of infringement of proprietary rights. If a private forest ground is surveyed by remote sensing from outer space and the derived data indicates the quality of the wood in the forest, the sale of this information to a company seeking timber rights seems to be a comparable unlawful infringement on private property rights.

Also, buildings and objects of art may qualify for copyright protection. Some copyright laws prohibit commercial photography and distribution of photographs of buildings and objects of art which are permanently situated outside the view of public streets, and highways, or squares.⁵⁵ Permission to enter a historic museum or art gallery does not imply permission to photograph. It may be argued that neither the airspace nor the outer space can be equated to a public thoroughfare, and that they do not reasonably fall within this exception to copyright protection.⁵⁶ One expects his building or land adjacent to a public place to be the object of photography, but not his atrium or private grounds surrounded by walls.

Remote sensing technology may come to touch more than property rights. Another important individual right is that of privacy. The essence

⁵³ *E.I. duPont de Nemours v. Christopher*, 431 F.2d 1012 (5th Cir. 1970) (taking unpublished plans).

⁵⁴ *Schloss Tegel*, Bundesgerichtshof Zivilsachen (BGHZ) 778 (Sept. 20, 1974).

⁵⁵ SCHLEICHER, REIMANN, & ABRAHAM, *DAS RECHT DER LUFTFAHRT KOMMENTAR*, para. 27, n. 11 (1966).

⁵⁶ Under Article 905 of the German Civil Code (*BÜRGERLICHES GESETZBUCH (BGB)*) the owner has the right to prohibit overflight in the airspace over his ground for photography purposes. This is consistent with the decision in *Schloss Tegel*. See also Arts. 903 and 1004.

of privacy is the protection of the person from intrusion, rather than the protection of physical property.⁵⁷ Invasion of privacy may result through the intrusion upon one's physical solitude or seclusion or the appropriation of one's name or likeness for commercial benefit. Public disclosure of highly private facts is also an invasion of privacy, as is placing one in a false light in the public eye.⁵⁸ Intrusion upon physical solitude and commercial appropriation may become torts with special significance, as the technology in remote sensing becomes more advanced.

An interesting line of cases recently dealt with the right to privacy in the context of aerial surveillance by police helicopters.⁵⁹ The courts have noted that "the expectation of privacy is not earthbound and that the Fourth Amendment to the Constitution guards the privacy of human activity from aerial no less than terrestrial invasion."⁶⁰ California courts have held that nontrespassory surveillance can be unreasonable and therefore unconstitutional and that the observer's altitude is only a minor factor.⁶¹ One judge stated that judicial implementation of individual safeguards needs constant accommodation to the ever intensifying technology of surveillance.⁶²

In one case, a California court rejected the contention that the location (by aerial surveillance) of marijuana crops growing on private land constituted an invasion of privacy. The court said agriculturalists could not reasonably expect their crops to be concealed from aerial view and that therefore there was no expectation of privacy.⁶³ Strong social policy, however, has impelled the courts to refuse to provide a shield of privacy for those cultivating or trafficking in narcotics. Where no illegal activity is involved, the expectation of privacy may be enlarged, and the courts may well shield the individual from intrusion upon his solitude and from the commercial appropriation of facts about his own activities within his own land.

States may assert a territorial, national, or protective basis for extending their laws to outer space.⁶⁴ The Outer Space Treaty expressly recognizes

⁵⁷ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 802-04 (4th ed. 1971).

⁵⁸ See, *Galella v. Onassis*, 487 F.2d 1986 (2d Cir. 1973); *Estate of Bethiaume v. Pratt*, 366 A.2d 792 (D.C. 1976); *Froelich v. Adair*, 213 Kan. 357, 516 P.2d 933 (1973); 62 AM. JUR. 2d, *Privacy* §26; RESTATEMENT (SECOND) OF TORTS 652, (Tent. Draft No. 13) and Note, 39 MO. L. REV. 647 (1974).

⁵⁹ See generally, *Police Helicopter Surveillance—The Shrinking Reasonable Expectation of Privacy*, 11 CAL. WEST. L. REV. 505 (1974-75).

⁶⁰ *Dean v. Superior Court*, 110 Cal. Rptr. 585, 588, 35 Cal. App. 3d 112, 117 (1973). "Expectations of privacy are not earthbound. The Fourth Amendment guards the privacy of human activity from aerial no less than terrestrial invasion."

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 590, 35 Cal. App. 3d 113.

⁶⁴ In the international legal sense, the term jurisdiction can be understood in two ways: (1) jurisdiction to prescribe a rule of law as to certain categories of persons, events, or places (commonly called prescriptive jurisdiction) and (2) jurisdiction to enforce a rule of law to categories of persons (enforcement jurisdiction), see RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§7(2), 17, and 18. In the sense of this article, jurisdiction is used to mean prescriptive jurisdiction.

the nationality basis of jurisdiction⁶⁵ but the treaty does *not* exclude other bases for exercising jurisdiction. The territorial basis for the exercise of jurisdiction in international law is extensive. Territoriality not only permits a state to prescribe a rule of law for conduct which occurs *within* its territory, but also for conduct which occurs *outside* its territory which has a substantially harmful, direct, and foreseeable effect on its economy or security.⁶⁶ In the case of the *S.S. Lotus*,⁶⁷ the Permanent Court of International Justice held that no rule of international law prohibited a state from exercising its criminal jurisdiction over a foreigner whose conduct on the high seas was criminal under local law and which produced its effects upon the territory of the state. A similar rule was pronounced by Judge Learned Hand in *United States v. Alcoa* which extended the Sherman Antitrust Act to foreign conduct and foreign nationals.⁶⁸ Hand J. stated that "[i]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."⁶⁹

Commercial enterprises in the United States, Germany, and Japan have already expressed interest in launching their own private remote sensing satellites in the next decade. The study by the Battelle Institute shows such ventures may become commercially feasible and profitable, particularly for those engaged in mineral and oil exploration.⁷⁰ Their activities will be closely observed not only by competitors but by subjacent states. It is possible that some subjacent states may continue to perceive remote sensing by satellite as a threat to their economic welfare or national security. They may seek to apply their own criminal laws to outer space, using cases following *Alcoa* and *Lotus* as precedent. Without some treaty rule, individual private rights may be held to have been violated by the ever increasing perceptiveness of the orbiting eye in space.

It is therefore the province and responsibility of the UN Committee on Peaceful Uses of Outer Space (COPUOS) to fashion practical treaty rules, acceptable to most countries, which will harmonize this activity with state interests. The Legal Sub-Committee of COPUOS presently has under consideration several proposals.⁷¹ In 1973, the Soviet Union submitted

⁶⁵ Art. VIII, Outer Space Treaty, *supra* note 16.

⁶⁶ *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967), *see also* German Cartel Law, Act against Restraints of Competition (GWB) Art. 98(2); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§17, 18. As to punishable extraterritorial conduct when it affects governmental interests, *see United States v. Pizzarusso*, 388 F. 2d 8 (2d Cir. 1968).

⁶⁷ *The S.S. Lotus*, France v. Turkey, [1927] PCIJ, ser. A, No. 10.

⁶⁸ *United States v. Alcoa*, 148 F. 2d 416 (2d Cir. 1945).

⁶⁹ *Id.* at 443.

⁷⁰ BATTELLE . . . SURVEY, *supra* note 4, at 47-55.

⁷¹ For extensive reference to the early work of the Legal Sub-Committee, *see* Gallo-way, *Teledetection of Earth Resources by Satellites*, in PROCS. 16th COLLOQUIUM ON THE LAW OF OUTER SPACE, *supra* note 37, at 90-102. *See also* Report of the Legal Sub-Committee on the Work of its 15th Sess., UN Doc. A/AC.105/171 (May 28, 1976) and its 16th Sess., UN Doc. A/AC.105/196 (April 11, 1977) and Report of the

draft principles for regulation of remote sensing activity from outer space.⁷² Its proposal provided that each state had an inalienable right to dispose of its natural resources and the information concerning those resources. It further provided that information as to natural resources could not be transmitted to third states without the consent of the sensed state. Subsequently, France and the Soviet Union jointly sponsored draft principles which elaborated on the original Soviet draft.⁷³ The joint draft provides that information about a state derived from remote sensing cannot be published without the express consent of that state and that documentation derived from remote sensing may not be transferred to third parties without subjacent state consent.⁷⁴ The only exception is for information pertaining to natural catastrophes and phenomena that may damage the environment as a whole.

Argentina, later joined by a number of Latin American countries, was the sponsor for an even stricter rule.⁷⁵ It would prohibit any remote sensing activity relating to natural resources under national jurisdiction without prior consent.⁷⁶ The proposal would rule out even initial acquisition, while the Soviet-French proposal only prevents transfers to third parties. The United States has long espoused and consistently adopted a policy of open sensing of the world's natural resources and the public, unrestricted dissemination of all data derived therefrom.⁷⁷ The USSR has now announced that it has an operational remote sensing program and that data acquired by this program is available to any country upon request.

The fourteenth session of the Scientific and Technical Sub-Committee of COPUOS convened in February 1977. At that time, the Soviet delegation restated a proposal it had previously made that data be classified as global, regional, and local according to the spatial resolution afforded by

Scientific and Technical Sub-Committee on the Work of its 14th Sess., UN Doc. A/AC.105/195 (March 1, 1977).

⁷² UN Doc. A/AC.105/133, USSR Model Draft Principles Governing Use of Space Technology; Report of the Legal Sub-Committee on the Work of the 13th Sess. (June 6, 1974).

⁷³ UN Doc. A/AC.105/C.2/L.99, Joint USSR-France Draft on Remote Sensing by Satellite (May 27, 1974).

⁷⁴ Article 5(b) of the joint draft provides:

A State which obtains information concerning natural resources of another State as a result of remote sensing activities shall not be entitled to make it public without the clearly expressed consent of the State to which the natural resources belong or to use it in any other manner to the detriment of such State. Documentation resulting from remote sensing activities may not be communicated to third parties, whether governments, international organizations, or private persons without the consent of the State whose territory is affected.

Subsection 5(c) permits an exception for information as to natural disasters or other phenomena potentially detrimental to the environment.

⁷⁵ Argentina draft, UN Doc. A/AC.105/C.2/73 (June 26, 1970); Brazilian draft, UN Doc. A/AC.105/122 (Feb. 4, 1974). The two drafts were later combined. UN Doc. A/C.1/1047 (Oct. 15, 1974). Subsequently, Chile, Venezuela, and Mexico became cosponsors of the combined draft. Report of the Legal Sub-Committee on the Work of its 14th Sess. UN Doc. A/AC.105/147, at 8 (March 11, 1975).

⁷⁶ Art. V, UN Doc. A/C.1/1047 (Oct. 15, 1974).

⁷⁷ UN Doc. A/AC.105/C.2/L.103 (Feb. 19, 1975).

the remote sensing instrumentation.⁷⁸ Global information would comprise all imagery with spatial resolution of more than several hundred meters. Regional information would be data with spatial resolution of 50 meters to several hundred meters. Local information would be data with 50 meter resolution or less. It was the Soviet view that global and regional data could be openly disseminated but that local data should not be except by permission of the subjacent state.⁷⁹ The French delegate suggested that the thrust be to analyzed information, rather than the data itself and that information drawn from data with a spatial resolution finer than 10 meters should be made the subject of a treaty.⁸⁰ No agreement was reached in the Scientific and Technical Sub-Committee, and the matter was referred to the UN Secretariat for further study. The Scientific and Technical Sub-Committee noted that the spatial and spectral resolution of Landsat D will be vastly improved over first generation Landsat.⁸¹ Landsat D may incorporate a thematic mapper and will have six spectral channels, and it will have about 30 meters spatial resolution. It will increase the number of detectable color levels from 64 to 256 and transmit data to ground stations at over seven times the current rate of Landsat C.⁸² Operating earth stations cooperating with Landsat D will require more complex equipment to handle this increased level and sophistication of data.

The sixteenth session of the Legal Sub-Committee met from March 14 to April 8, 1977. Working Group III on Remote Sensing was reestablished and held thirteen meetings. A revised text of possible draft principles was prepared. However, no agreement was reached on the core problem of whether state sovereignty over natural resources extends as well to information (or data) derived from satellite activity. An informal working group paper submitted by Sweden proposed a useful distinction between the terms "primary data" and "analyzed information." The former term refers to the raw data acquired by satellite remote sensors. The latter to the final interpretation of that data. This distinction helps to clarify the various state claims to sovereignty over natural resources. The unresolved issue of the sovereignty of a sensed state over data or information about its territorial wealth will again be a priority subject at the seventeenth session of the Legal Sub-Committee which convenes next spring.

India has plans to launch its own experimental earth observation satellite,⁸³ and the European Space Agency (ESA) intends to place remote sensing instrumentation on a spacelab when the space shuttle carries it into orbit in 1980.⁸⁴ ESA also plans to place in outer space a remote sensing

⁷⁸ Report of the Scientific and Technical Sub-Committee, 14th Sess., *supra* note 71, at 10.

⁷⁹ *Id.* at 11.

⁸⁰ *Id.* at 10, 11.

⁸¹ *Id.* at 12.

⁸² *Id.* See also, Johnston statement, *supra* note 5.

⁸³ The Indian satellite will be called SEO (Satellite for Earth Observation).

⁸⁴ France is proposing a new earth remote sensing satellite called Spot to be launched in 1983. Spot would have better resolution cameras for resources detection than Landsat or Seasat satellites. MONTHLY SURVEY OF SELECTED EVENTS . . . , *supra* note 41.

capability on a low-earth, high inclination orbit in 1983. It seems obvious that progressive advances in technology make questions concerning rights to privacy, property, and security more acute.

As the use of Landsat becomes widespread and the state of technology advances, more information about our earth, its population, and its resources will come into the public domain. Geologists, cartographers, census takers, even tax assessors, will want more data about the land and about land use. Individual privacy is generally considered subordinate to freedom of information.⁸⁵ However, it may be anticipated that the courts may place some limitation on freedom of access and use of information in deference to private rights. At what level this limitation may be set—that is, where information extracted amounts to a property right or constitutes a substantial intrusion on private lives—will, in my view, be determined by the judicial process.

Thus far the Legal Sub-Committee of COPUOS has not grappled with specific issues as to individual rights to privacy and property, nor has it defined these terms. There is an urgent need to do so. The courts may judicially ascribe the proper balance between freedom of information and individual protection, but the United Nations, and specifically COPUOS, must set forth the basic terms of reference and the principles to be followed in the conduct of remote sensing from outer space. An international agreement could chart the course in the same manner that the Outer Space Treaty of 1967 charted the overall course for general space activity. Treaty law, to the extent that it is paramount over national law,⁸⁶ could place limits on the extraterritorial, and often unpredictable, reach of national law. It would also provide a foundation for the courts to build their own judicial safeguards for sovereign and private rights. Specifically, some of the principles which could be contained in such an agreement are that:

- (1) Remote sensing from outer space is a peaceful activity.
- (2) The Outer Space Treaty of 1967 applies.
- (3) Remote sensing is to be used only to promote social, economic, and cultural benefits.
- (4) The acquisition, processing, dissemination, and analysis of data

⁸⁵ The guarantee of freedom of speech and the press is contained in the First Amendment to the U.S. Constitution and the principle is enshrined in numerous Supreme Court decisions, see PROSSER, *supra* note 57, at 819–33.

⁸⁶ See Article 26 of the French Constitution of October 27, 1946, which provides that “diplomatic treaties duly ratified and published shall have the force of law even when they are contrary to internal French legislation,” as amended by Article 55 of the Constitution of 1958, “treaties or agreements . . . have an authority superior to that of [national] laws . . .” See also Article 66, Constitution of the Netherlands of 1815, as amended. U.S. court decisions hold that a treaty is only *equal* in rank to acts of Congress (see Article VI, clause 2, of the U.S. Constitution). Therefore, a statute subsequent in time renders a prior inconsistent treaty null and void. *Reid v. Covert*, 354 U.S. 1, 18 (1957). However, under the normal rules of interpretation, treaties and laws will be construed so as to avoid incompatibility where this can be reasonably done. Thus, national laws not specifically extending to outer space, even if enacted after a general treaty on this subject, should not apply in derogation of treaty provisions.

derived from remote sensing is to be without restriction *except* as provided in bilateral or regional agreements.

(5) States may agree on a regional or bilateral basis to limit dissemination and use of derived data which has a substantial economic impact on the states surveyed.

(6) National laws may regulate the *use* of information derived from remote sensing data within the nation state, but do not apply to the activity itself.

(7) States should make widely known internally and externally the benefits derived from this program.

(8) Rights to property and privacy are to be respected by users and operators. No state, corporation, organization, or individual should use satellite-derived data to gain an economic advantage without full opportunity for other affected parties to have access to the data and the analyzed information.

(9) Satellite-derived information may not be used as evidence in criminal prosecutions.

(10) Maximum cooperation between states and maximum exchange and distribution of satellite-derived data are to be encouraged to the end that this system can be used for the general benefit of mankind.

(11) The Outer Space Affairs Division of the United Nations Secretariat should serve as the center for the implementation and distribution of agreed rules and/or principles on remote sensing by satellite. It should be a repository for all laws or regulations, national and international, pertaining to these satellites and lend its good offices for the settlement of disagreements as to the interpretation or application of international rules and regulations regarding this activity.

By articulating in treaty form minimum safeguards, many potential explosive issues can be avoided. The increased sophistication of aerial surveillance has caused concern in many U.S. courts. Predictably, the development of remote sensing techniques from outer space will also generate concern and vexing legal problems. A treaty of guiding principles can mute these problems and harmonize diverse interests.

Neither an international remote sensing organization nor an international data system seems to be an urgent requirement today. Data sources can be harmonized by agreement and cooperation with the Outer Space Affairs Division of the United Nations.⁸⁷ A separate organization is both too elaborate and too expensive and would engender a new variety of problems as to control and operation. Remote sensing is not an activity involving participation in a shared resource, as in the case of direct broadcasting satellites (ITU) and global commercial communications system (INTELSAT). It does not require a uniform standard for the safety of

⁸⁷ The Scientific and Technical Sub-Committee noted that different operational systems can raise problems of compatibility of technical features and complementarity of roles. The Sub-Committee believes the United Nations has a special role in the harmonization of different systems. Report of the Scientific and Technical Sub-Committee, 14th Sess., *supra* note 71, at 14, para. 56.

private lives and security of vessels, as in the case of maritime commerce (INMARSAT). It is a system which seems particularly susceptible to private enterprise and competition in maximizing the benefit derived from earth-orbiting satellite sensing.

Any remote sensing system must be flexible enough to permit private initiative and entrepreneurial activity and yet avoid the unfair reach into the most sensitive or coveted bastions of the less developed and the more apprehensive states. A guiding treaty of principles, judicially interpreted and implemented, with the guidance of COPUOS and the advice of Outer Space Affairs Division, will insure an important role for earth resources orbiting satellites for generations to come.⁸⁸

⁸⁸ A recent report of the Comptroller General foresees many questions being raised as the U.S. Landsat system evolves from an experimental project to an operational system. The report recommends that the Director of the Office of Science and Technology Policy, Executive Office of the President, undertake a study as to the government's role in satellite based, remote sensing technology. U.S. COMPTROLLER GENERAL, REPORT TO THE CONGRESS, LANDSAT'S ROLE IN AN EARTH RESOURCES INFORMATION SYSTEM (June 10, 1977). See also NATIONAL ACADEMY OF SCIENCES, REPORT OF THE AD HOC COMMITTEE ON REMOTE SENSING FOR DEVELOPMENT, BOARD ON SCIENCE AND TECHNOLOGY FOR INTERNATIONAL DEVELOPMENT, NATIONAL RESEARCH COUNCIL, RESOURCES SENSING FROM SPACE: PROSPECTS FOR DEVELOPING COUNTRIES (1977) and statement by Eilene Galloway, *A Bill to Develop and Establish an Earth Resources and Environmental Information System: Hearings on S. 657 Before the Subcomm. on Science, Technology and Space of the Senate Comm. on Commerce, Science and Technology*, 95th Cong., 1st Sess. (1977).

NOTES AND COMMENTS

OFF-SHORE OIL EXPLORATION BY A BELLIGERENT OCCUPANT: THE GULF OF SUEZ DISPUTE

Since the 1967 war Israel and Egypt have been at loggerheads over oil exploration rights in the Gulf of Suez.¹ Until 1976 the dispute remained largely dormant as Israel concentrated its attention on tapping the very productive Abu Rhodeis fields in the Sinai. Before their return to Egypt in 1975, as part of the second Israel-Egypt Disengagement Agreement, these fields reputedly supplied Israel with more than half its needs. In 1976, Israel, now nearly totally dependent on energy imports from abroad, undertook a major effort at finding domestic sources. In the areas held as a consequence of the 1967 war, the sea waters around the town of El Tur on the Gulf of Suez became a scene of major prospecting and test drilling.² Egypt objected to Israel's operations, maintaining that the fact that Israel occupied land along the Gulf waters did not give it the right to exploit natural resources offshore.³ Israel replied that it had a right to drill up to a median point in the Gulf, roughly halfway between the Israeli-held Sinai desert and the Egyptian coast.⁴

Recently Israel's prospecting in the Gulf of Suez led to a further dispute, this time between Israel and the United States. On September 2, 1976, Israeli gunboats stationed off the coast of El Tur forced a U.S.-owned drilling rig under contract to Egypt to withdraw from what Israel contended to be its side of the median line of the Gulf.⁵ In the ensuing diplomatic exchange between Israel and the United States, the United States expressed opposition to Israel's claimed rights. On February 17, 1977, the eve of Secretary of State Cyrus R. Vance's fact-finding mission to the Middle East, a spokesman for the Department of State said that: "Our legal view is that Israel, as an occupying power in that particular area, does not have the right to exploit natural resources in occupied territory that were not already being exploited when the occupation began" and that, furthermore, Israeli drilling is "not helpful to efforts to get peace negotiations underway."⁶

¹ Regarding Israel's oil prospecting attempts in Sinai and the Gulf conducted largely unsuccessfully until 1971, see 27 ISRAEL ECONOMIST 291 (Sept. 1971).

² Regarding the urgency felt in Israel to find and to tap whatever oil fields might exist in Israel or in the administered areas and regarding unsubstantiated reports in mid-1976 that oil had been found in the Gulf of Suez, see 32 ISRAEL ECONOMIST 8 (June, 1976).

³ 29 THE MIDDLE EAST 81 (March, 1977).

⁴ N.Y. Times, April 4, 1977, at 4.

⁵ *Id.* Sept. 8, 1976, at 5. The oil rig involved belonged to GUPCO, a company jointly owned by the Egyptian General Petroleum Corporation and the American Oil Company (Amoco).

⁶ *Id.* Feb. 18, 1977, at 1 and April 4, 1977, at 4.

The controversy, which is still unresolved, raises several important questions about a belligerent occupant's rights in waters adjacent to occupied land areas and rights of resource exploitation and exploration generally. Additionally, the episode gave rise to political questions concerning the advisability of Israel's actions and the nature and appropriateness of the American response.

I.

THE APPLICABLE LAW

It is assumed at the outset that Israel's status in the Sinai is that of a belligerent occupant, with all the attendant rights and obligations accorded this position in international law.⁷ This does not presuppose, however, that such classification is free from legitimate legal question. It is recognized that Israel, notwithstanding international pressure to the contrary, refuses to concede the applicability, *de jure*, of the principal instruments of the law of belligerent occupation—The Hague Regulations of 1907 Relative to Land Warfare⁸ and the Fourth (Civilians) Geneva Convention of 1949.⁹ In Israel's view the Conventions assume the ousted power to be the legitimate sovereign, entitled to eventual reversion of the held territory.¹⁰ Since Israel is not willing to concede that, prior to the 1967 war, Egypt and Jordan were the lawful and legitimate sovereigns of the Sinai and the West

⁷ For concise treatments of the law of belligerent occupation, see 2 OPPENHEIM, *INTERNATIONAL LAW*, 403–17, 432–57, (7th ed., H. Lauterpacht, 1952); J. STONE, *LEGAL CONTROLS OF ARMED CONFLICT* 651–733 (1959); M. McDougal & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 732–833 (1961); and Gerson, *War Conquered Territory and Military Occupation in the Contemporary International Legal System*, 18 HARV. INT. L. J. 525 (1977).

⁸ Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907. 36 Stat. 2277, TS No. 539.

⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949. 3 UST 3515, TIAS No. 3365, 75 UNTS 287 (hereinafter referred to as the Geneva Civilians Convention). Israel and Egypt are both signatories to the Convention, their only reservations extending to their respective use of the Red Star of David and Red Crescent. See J. TOMAN, *INDEX OF THE GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS*, 12 AUGUST 1949, at 189–94 (1973).

¹⁰ This view is consistent with the cardinal principle inherent in the Hague Regulations and Geneva Convention that sovereignty does not vest in the occupant but rather remains in a state of abeyance pending reversion to the ousted power. Article 43 and Article 47 of the Hague Regulations and Geneva Convention respectively seek to protect the ousted power's reversionary interest by requiring the occupant to preserve the laws and institutions of the occupied region existing *ante bellum* unless absolutely prevented by reasons of public welfare or military necessity. See D. A. GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION, 1863–1914*, at 93–109 (1949); J. B. SCOTT, *THE HAGUE PEACE CONFERENCES OF 1899 and 1907*, at 525 (1908); E. H. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION*, 817 (1942); DEPT. OF THE ARMY, *LAW OF LAND WARFARE*, para. 358 (FM27-10, 1956); BRITISH MANUAL OF MILITARY LAW, Pt. III, para. 510 (1958). Regarding the difficult question posed in preservation of the status quo *ante bellum* where the existing order is unjust, violating fundamental human rights, see Baty, *The Relation of Invaders to Insurgents*, 36 YALE L. J. 966, 978 (1928).

Bank, respectively, and prefers instead to leave this question open, Israel feels bound not to admit the applicability of the two treaties to its military administration of these regions, lest its action be interpreted as constituting recognition of Egyptian and Jordanian sovereignty there.¹¹ Nevertheless, Israel has stated its intention to comply fully with them on a de facto basis and has thus implicitly stipulated its willingness to be judged by the standards they impose.¹²

Futhermore, so far as the applicability of the Hague Regulations and Geneva Civilians Convention are concerned the question whether occupation was effected in the exercise of the right of self-defense or out of aggressive design becomes irrelevant, for it is clearly established that rights deriving from these conventions apply equally to the lawful and the unlawful occupant alike.¹³ The determination of lawfulness of entry into foreign territory is useful only in assessing claims to ultimate control or sovereignty over occupied territory; the unlawful occupant is generally precluded from acquiring sovereignty over territory under the principles of *ex injuria jus non oritur* and of the nonadmissibility of acquisition of territory by force.¹⁴ The Hague Regulations and Fourth Geneva Convention thus provide, notwithstanding questions surrounding their de jure applicability and the origins of the 1967 war, the appropriate standards for judging Israel's administrative actions in the areas under its military control.

It has been questioned, however, whether a state can be deemed a belligerent occupant, for the purpose of the application of the Hague Regulations and the Geneva Civilians Convention, over sea areas. The Legal Adviser of the Department of State took the position in 1976 that a state cannot and that accordingly Israel's status in the Gulf of Suez is not that of a belligerent occupant.¹⁵

¹¹ Regarding Israel's position on the applicability of the Geneva Convention and, by implication, that of the Hague Regulations, see Shamgar, *The Observance of International Law in the Administered Territories* 1 ISRAEL YB ON HUMAN RIGHTS 262 (1971) and discussion in Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT. L. J. 1, 2-3, 39-40 (1973). Recent affirmation of Israel's position is found in statements before the UN Special Political Committee November 12, and 17, 1976. UN Docs. A/SPC/SR. 19, at 4 and A/SPC/SR. 22, at 11 (1976).

¹² *Id.*

¹³ See the Lighthouse case, [1934] PCIJ, ser. A/B, No. 62, at 52; Nuremberg Military Tribunal, *United States v. Wilhelm List, et. al.*, 14 UN WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 56 (1948); Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. YB. INT. L. 206, 213 (1953). For adoption of principle in U.S. federal decision, see *Aboitiz v. Price*, 95 F. Supp. 602 (D. Utah 1951) holding Japanese wartime enactments to have continuing legal validity notwithstanding the aggressive nature of the war waged. See, however, Wright, *The Outlawry of War and the Law of War*, 47 AJIL 365, 367 (1953); F. SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 224 (1966). See also extended discussion of applicability of lawful-unlawful dichotomy to occupants relative to both managerial and acquisition rights in Gerson, *supra* note 7.

¹⁴ See Art. 52, Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969), 63 AJIL 875 (1969), 8 ILM 679 (1969); Higgins, *The June War: The United Nations and Legal Background*, 3 J. CONTEMP. HIST. 253, 271 (1968).

¹⁵ See U.S. Dept. State, *Memorandum of Law on Israel's Right to Develop New Oil*

Article 42 of the Hague Regulations states that, for the purpose of the application of the Regulations, "[t]erritory is considered to be occupied when it is placed as a matter of fact under the authority of the hostile army." Although the Regulations annexed to Hague Convention IV are officially, entitled "Regulations Respecting the Laws and Customs of War on Land," it would be mistaken to assume that it was intended to exclude the possibility of application of some of their provisions to sea areas. Of course, almost all of the Hague Regulations, which are predominantly concerned with matters germane to the military administration of land territory, such as treatment of prisoners of war, the wounded and sick, the civilian population, and the preservation of existing laws and institutions, apply to issues that can arise only in a land context. Perhaps for that reason the title of the Convention was limited as it was. However, Article 53 of the Hague Regulations does make reference to occupants' rights at sea in allowing enemy property situated thereon, in the form of weapons, communications systems, or the like, to be appropriated as if found on land.¹⁶ And tribunals, when confronted with the issue, have consistently upheld occupation rights on rivers and at sea as well as in land areas that are occupied.¹⁷

In each instance, be it on land, in the air, or at sea, the crucial test whether the rights and obligations of the Hague Regulations and the Geneva Civilians Convention are applicable has been held to be whether actual authority has been established in the claimed area, and, if so, whether the occupant is capable of effectively exercising it.¹⁸ This does not imply the extension of military control to every nook and corner of the disputed territory. Rather,

[it] is sufficient to dispose at some places within the territories of such a strong force that its power can be extended if necessary over the whole region in order to guarantee a certain minimum of legal order and legal protection within the boundaries, and to exclude any interference from a third State.¹⁹

Fields in Sinai and the Gulf of Suez, dated Oct. 1, 1976, 16 ILM 733 (1977). The Memorandum takes the position that:

The concept of belligerent occupation is exclusively one of the law of land warfare. While the notion of occupation of the territorial sea may be somewhat problematic, it is clear that high seas are not subject to belligerent occupation and that neither party to the Egyptian-Israeli dispute at present enjoys rights to belligerent activity on the high seas.

Id. 749.

Substantiation in support of this proposition is not offered in the U.S. memorandum.

Egypt claims a twelve-mile territorial sea in the Gulf. The United States and Israel refuse recognition to any claims beyond three miles. This study concurs with the U.S. position that the nonterritorial sea is by its very nature not subject to belligerent occupation and limits its inquiry to the occupation of the territorial sea.

¹⁶ Art. 53, Hague Regulations:

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

¹⁷ See the *Navigation of the Danube case*, 1 UN R. INT ARB. AWARDS 97 (1927); The *Lighthouse case*, 12 *id.* 161 (1956).

¹⁸ See OPPENHEIM, *supra* note 7, at 434.

¹⁹ Von de Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AJIL 463 (1935).

Thus, to the extent that Israel maintains that its occupation of land territory automatically carries with it rights of occupation over the adjoining territorial sea, its position is untenable. Territorial rights on land or sea exist only to the extent that control over such areas is effectively exercised. On the other hand, the American position that rights under the Hague Regulations and Geneva Civilians Convention cannot extend to the territorial seas, whether under effective military control or not, is unsupportable. There is nothing in the text of the relevant conventions, in the context in which they were promulgated, or in the history of their application that justifies such an interpretation of the word "territory" in Article 42 of the Hague Regulations.

II.

RIGHTS OF BELLIGERENT OCCUPANTS TO EXPLOIT NATURAL RESOURCES

Article 23 of the Hague Regulations²⁰ and Article 52 of the Fourth Geneva Convention²¹ of 1949 provide that enemy property must not be destroyed unless absolutely necessary for reasons of the occupant's military security. Short of destruction, wide discretion is granted to the occupying power to use enemy public property or state-owned property as it sees fit, subject to certain qualifications. The most important of these is that a belligerent occupant does not acquire title to the real property of the ousted sovereign; the ousted sovereign retains a reversionary interest therein, and the occupant's control is limited to the duration of the occupation. All moveable property belonging to the hostile state which can be used for military operations, such as depots of arms, means of transport, stores, supplies, cash, funds, and realizable securities, may be seized by the occupying power.²² Immovable property such as land and public buildings may be used providing it is neither sold nor destroyed.²³ Mineral and agricultural extraction may, within limits to be discussed, be undertaken.²⁴

What is specifically forbidden and what is enumerated in Article 147 as a grave breach of the Geneva Convention is "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."²⁵ Where the extraction and use of resources from enemy public "immovable" property is in question,²⁶ Article 55 of

²⁰ In addition to the prohibition provided by Special Conventions, it is especially forbidden . . .

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war; . . .

²¹ "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

²² Art. 53, Hague Regulations.

²³ Art. 55, Hague Regulations.

²⁴ *Id.*

²⁵ Professor Georg Schwarzenberger states that even prior to the advent of Article 147 of Geneva Convention IV, the same prohibition against wanton appropriation or destruction of enemy property could be extrapolated by application of the standard of civilization inherent in the laws of war. See 2 G. SCHWARZENBERGER, INTERNATIONAL LAW 78, 109-27, 254 (1968).

²⁶ Regarding classification of crude oil in the ground as "immovable" property for

The Hague Regulations provides that:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile States and situated in the occupied territory. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Commenting on Article 55, McDougal and Feliciano in their authoritative work, *Law and Minimum World Public Order* state:

As a practical matter, the applicable specific prohibitions are simply that the occupant may not wantonly dissipate or destroy the public resources and may not permanently (i.e. for the indefinite future) alienate them (*salva rerum substantia*).²⁷

Thus, it has been widely held that the "fruits" of public land—crops, timber, and minerals—may be exploited and sold providing their production neither depletes nor wantonly dissipates existing resources, but rather is consistent with sound ecological considerations.²⁸ What contemporary international law seeks to prevent in regard to mineral exploitation is, in the terminology of the Nuremberg Tribunal, the crime of "spoliation"—wanton, premeditated, and systematic destruction or plunder of the economic substance of occupied territory.²⁹

A contrary rule prohibiting resource exploitation by an occupying power would make little sense from any vantage point. Rules must conform to reasonable expectations of behavior if their authority is not to be eroded. Nowhere is this more true than in the international arena where little sanctioning power exists. It is unrealistic to envisage any occupying power voluntarily abiding by a rule requiring it to let fertile fields lie fallow and proven oil fields untapped.

The rationale for a countervailing rule is that exploitation of natural resources by an occupying power, even where prudent in nature and non-depletive, ineluctably leads to the creation of vested interests for continued occupation. This, in turn, hampers peace efforts, which would normally look to relinquishment of occupied territory in exchange for the resumption of peaceful relations. Posed abstractly in this manner, this argument is

the purpose of application of Article 55 of the Hague Regulations, see *N. V. de Bataafsche Petroleum Maatschappij v. War Damage Commission*, 23 I. L. R. 810 (Court of Appeal, Singapore, 1956), noted in 71 HARV. L. REV. 568 (1958).

²⁷ McDougal & Feliciano, *supra* note 7, at 812-13.

²⁸ See the Guano case, 15 UN R. INT. ARB. AWARDS 125, 295, 367 (1901). Although this case arose before adoption of the Hague Regulations and although the decision makes no reference to Article 55 in the 1899 draft version of the Hague Regulations, the statement of the law the arbitrators considered as binding was that in relation to immovable enemy public property the occupying power is, as Article 55 of the Hague Regulations specifies, in the position of a usufructuary. The Tribunal made it clear that the occupying power (Chile) was permitted in its role of usufructuary to extract mineral resources, providing appropriate care to preserve the corpus of the property was exercised. As illustrative of the text writers supporting this position, see M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 287-90 (1959); STONE, *supra* note 7, at 714-15.

²⁹ The Farben case, (*United States v. Krauch et al.*, 1948), 10 UN WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 45-50; the Krupp Trial (*United States v. Krupp von Bohlen et al.*, 1948) *id.* 130-70.

difficult to refute. An occupant of territory yielding substantial oil revenues would, naturally enough, be less inclined to forego control than would one holding territory which is barren of minerals. Yet, seen in the context of state practice, it hardly follows that a rule forbidding mineral extraction by occupants necessarily tends to further the process of peacemaking. For just as the occupant exploiting mineral resources may be hesitant to trade this bounty for peace, it is equally plausible that the other side, the displaced sovereign, which might otherwise hesitate to negotiate a peace settlement may be spurred to do so by the lure of oil profits from new wells opened by the occupant.

Further, unlike what may be the case when an occupying power settles its nationals on occupied territory, disentanglement from oil production and transfer of its apparatus is relatively easy to accomplish. Israel's peaceful transfer of the oil wells at Abu Rhodeis in the Sinai to Egypt in 1975 as part of the second Israel-Egypt Sinai Accord provides the perfect example. Until transferred, the value of these wells, which reportedly supplied Israel with one half of its needs,³⁰ might, given the unstable source of Israel's remaining supply, have deterred Israel from offering their return, even in exchange for a final and meaningful peace treaty. Yet Israel in the second Sinai Accord relinquished these wells for something much less than a peace treaty—Egyptian assurances of a reduction of belligerent measures manifested in only one concrete act, the opening of the Suez Canal to Israel-bound cargo.

To recapitulate, contemporary international law forbids exploitation of natural resources, including oil, only where the practice is marked by wanton dissipation of such resources. This rule is in accord with community expectations and judicial decisions. And, its application presents no clear impediments to the quest for peace, at least in the context of Israeli-Egyptian relations.

III.

SHOULD A BELLIGERENT OCCUPANT'S RIGHTS TO OIL EXPLORATION DIFFER FROM HIS RIGHTS TO OIL EXPLOITATION?

While the spokesman for the U.S. Department of State conceded the lawfulness of Israel's action in extracting oil from the fields at Abu Rhodeis, exploitation of which antedated the assumption of Israeli control in 1967, he distinguished such activity from prospecting for and drilling of new fields in the Gulf of Suez. The legal basis suggested for this difference in treatment is the distinction perceived in Article 55 of the Hague Regulations between resource exploitation and exploration rights.³¹ He asserted

³⁰ INTERNATIONAL PETROLEUM ENCYCLOPEDIA 84 (1970).

³¹ Dept. of State Memorandum, *supra* note 15, at 736-43. See also especially Cummings, *Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation*, 9 J. OF INT. L. & ECONOMICS 533, (1974) which the State Department memorandum relies upon and cites with approval. Cummings' conclusion is that:

Because of the unanimity in the Roman law, civil law, and common law on the issue of exploiting mineral resources under the concept of "usufruct" (as used in

that the usufructuary standards of Article 55 embody the classical municipal law of usufruct and as such prohibit, under what has been termed in more contemporary terms the "open mine" doctrine,³² the usufructuary, usually a tenant, from developing new mines. Instead, his enjoyment of the property is limited to the use and operation of mines already in operation before the commencement of the usufruct. The justification for this rule is grounded in the concept that the opening of land to search for resources may constitute a destruction or waste of the permanent corpus of the land in the usufructuary's control—that is, the land may be rendered unsuitable for its normal use and its value reduced.³³ The owner should not be faced with this risk and, accordingly, all destruction of land to search for hidden resources, regardless of their potential value, is prohibited absent the owner's express permission.

Applying these principles to the case of offshore oil exploration in the Gulf of Suez, it becomes readily apparent that waste and injury to the value of territory—the evil sought to be avoided in forbidding the usufructuary's opening of new mines—is simply not a realistic concern here. Exploration for oil in occupied sea areas should clearly be proscribed in so far as it threatens harm either in terms of its commercial or other use. However, in the present case the question presented is not whether Israel's prospecting for oil in the Gulf is detrimental to the area. Indeed it is taken for granted that searching for and discovering new oil deposits will enhance the value of the Gulf waterway.

The only real legal question presented in the Gulf of Suez dispute is whether Egypt's reversionary interest is endangered by the Israeli action. This is the key to the American objection.³⁴ It was feared that Israel's drilling activity was counterproductive to the search for peace because,

Article 55 of the Hague Regulations) it can be concluded that an occupying power does not have a right to exploit oil from an area . . . when oil resources were not exploited prior to the commencement of occupation.
Id. 565.

³² See Comment, *The Open Mine Doctrine*, 8 HOUSTON L. REV. 753 (1971); Woodward, *The Open Mine Doctrine in Oil and Gas Cases*, 35 TEXAS L. REV. 538 (1957).

³³ See 2 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND:

To open the land to search for mines of metal, coal, etc. is *waste*; for that is a *detriment to the inheritance*; but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use; for it is now become the mere annual profit of the land.

Ch. 18 at 284 (emphasis added). See affirming the centrality to the "open mine" doctrine of wastefulness and injury to the corpus of the land inherent in opening new mines, 2 E. COKE, FIRST INSTITUTE OF THE LAWS OF ENGLAND, Sect. 54b (J. Thomas ed. 1836). See also *Ohio Oil Co. v. Doughetee*, 240 Ill. 361, 88 N.E. 818 (1909) where the court reaches the conclusion that a tenant may not engage in the exploitation of oil other than through the means of oil wells existing at the assumption of his tenancy on the grounds that there is a well established rule that the opening of new mines upon land by a tenant amount to "waste." This case and others as well as commentary thereon are cited in Cummings, *supra* note 31, at 563-65.

³⁴ Dept. of State Memorandum, *supra* note 15, at 746.

A rule holding out the prospect of acquiring unrestricted access to and use of resources and raw materials, would constitute an incentive to territorial occupation by a country needing raw materials, and a disincentive to withdrawal.

given the capital investment inherent in oil exploitation,³⁵ such activity signals, wittingly or not, a determination not to yield this area in exchange for Arab normalization of relations with Israel.

If pressed to answer this charge, Israel would presumably justify its stance as constituting a lure rather than a hindrance to negotiation by making more valuable the prize of reacquisition of Israeli-held territory.

International law is, however, of little utility in determining whether the American or Israeli position on this issue is the more appropriate one. Whether a state's action induces or discourages the making of peace by its opponent is simply not a legal issue. It is a political question the answer to which depends on the exigencies of the moment, not on enduring principles of conduct.

Viewed in legal rather than political perspective, Israel's activities in the Gulf of Suez are therefore not properly subject to condemnation. As a usufructuary in the territorial sea, Israel was required to take steps to conserve the corpus of the ousted power's territory temporarily in its possession. To the extent the search for new oil fields created a "wasting" of the land, it is proscribed. In the Gulf of Suez, oil drilling only represented an enhancement in value. Viewed in political terms, Israel's actions are subject to serious question. It is regrettable that these political considerations affecting the American posture were not fully aired in public but were instead masked by strained interpretations of international law.

ALLAN GERSON

THE BEAGLE CHANNEL AFFAIR

The Beagle Channel is a waterway connecting the Atlantic and Pacific Oceans. Located in the Archipelago of Tierra del Fuego, at the southern tip of the South American continent, it runs in a general east-west direction at the latitude of Parallel 55° S.

In its western part, the Channel divides into two long branches, known as the southwestern and the northwestern arms. After their junction, there is a stretch of fairly straight, parallel coasts and then the Channel widens and curves towards the southeast to form the eastern mouth, the exact shape and extent of which have been a matter of disagreement between

³⁵ Israeli economists estimate that at least 200 days of significant oil extraction will be needed to cover the \$2.5 million production costs involved in the planned drilling project. Fifty percent of these costs are, however, to be picked up by the unnamed foreign parties to the drilling operations. One reason for involvement of a foreign firm was specifically to allow for splitting the loss involved in forfeiture of the fields if doing so becomes politically expedient. See 32 ISRAEL ECONOMIST 8 (June 1976). Contrast the above figures with the fact that in 1974 Israel's estimated oil needs were in the order of eight million tons which at the then going rate of \$16 a barrel or \$120 a ton would amount to a little more than \$1,000 million per annum. More than half of Israel's projected oil needs in 1974 came from Abu Rhodeis, saving Israel roughly \$500 million in oil costs. Jerusalem Post, Jan. 18, 1974, at 4. (Magazine).

Argentina and Chile. Here lie three fairly large islands, Picton, Nueva, and Lennox.¹ Sovereignty has been disputed as to these islands together with many smaller ones, some of which are adjacent to the three larger ones at the mouth of the Channel, while others are situated in its inner part. As a matter of fact, no boundary line had ever before been traced within the Beagle Channel.

The Archipelago of Tierra del Fuego is composed of many islands of different sizes, one of which is by far the largest and most important. This is called "Isla Grande" ("Big Island") or simply "Tierra del Fuego," just like the Archipelago.

The last stretch of land boundary line was traced on Isla Grande and follows the 68°36'38"5W. meridian until it touches the Beagle Channel. To the west of that line, Isla Grande is Chilean, while to the east it is Argentine. Consequently, the Channel has an Argentine coast on its north and a Chilean coast on its south, both facing each other. Most of the smaller islands within the Channel are uninhabited, whereas the three larger ones at the mouth are sparsely populated by some 20 or 30 Chileans.

The boundary dispute between Argentina and Chile regarding this region dates back a long way. The first official attempts to solve it were made in 1904-05. After several fruitless negotiations over a protracted period of time (1904-05, 1906-07, 1915, 1938, 1955, and 1967) some of which resulted in unratified treaties, both parties submitted the dispute to the present arbitral procedure.

The "Agreement for Arbitration (*Compromiso*) of a Controversy between the Argentine Republic and the Republic of Chile concerning the Region of the Beagle Channel"² came into being within the framework provided by the General Treaty of Arbitration of 1902,³ a bilateral convention whereby the British Government was appointed as arbitrator to any dispute of whatever nature that might arise between the two parties (Arts. 1 and 3).

This was not the first time that the British Government had arbitrated differences between the two countries. Once under the 1902 Treaty and once under a former agreement of 1896, the British Government had acted in that capacity. On both occasions (1965-66 and 1898-1902, respectively), the Arbitrator had appointed an all British tribunal of its own choice to hear the case and report its conclusions to the British Government. The Beagle Channel Affair, however, had some peculiarities. Political difficulties between the United Kingdom and Argentina, particularly their dispute in respect of the Falkland (Malvinas) Islands, and other difficulties arising from positions adopted formerly by the parties in the course of the long controversy made it difficult to draft the *Compromiso*. Chile favored the arbitration of the British Government, while Argentina preferred recourse to the International Court of Justice. Finally, the parties agreed

¹ Not more than 100 square kilometers each.

² Between Argentina, Chile, and the United Kingdom, *done* at London, July 22, 1971, 0 ILM 1182 (1971).

³ Treaty of Arbitration between Argentina and Chile, *signed* at Santiago, May 28, 1902, 35 MARTENS, NOUVEAU RECUEIL GÉNÉRAL, 2d ser. 297 (1908).

on a text that included provision for a Court of Arbitration composed of five judges of the ICJ.⁴ This Court would not merely present a report to the British Government, but would render a "decision" as it was called in Articles II, XII paragraphs 2 and 3, and XIII of the *Compromiso*, which the British Government could either ratify or reject, but which it could not modify. If accepted, the "decision" would be communicated to the parties (Article XIII) "with a declaration that such decision constitutes the Award in accordance with the Treaty" of 1902.

As agreement could not be reached on a common question to be put to the Court, each party formulated its own question in Article I. The Argentine question read as follows:

The Argentine Republic requests the Arbitrator to determine what is the boundary-line between the respective maritime jurisdictions of the Argentine Republic and of the Republic of Chile from meridian 68°36'38"5W., within the region referred to in paragraph (4) of this Article, and in consequence to declare that Picton, Nueva and Lennox Islands and adjacent islands and islets belong to the Argentine Republic.

And the Chilean question:

The Republic of Chile requests the Arbitrator to decide to the extent that they relate to the region referred to in paragraph (4) of this Article, the questions referred to in her Notes of 11th December 1967 to Her Britannic Majesty's Government and to the Government of the Argentine Republic, and to declare that Picton, Lennox and Nueva Islands, the adjacent islands and islets, as well as the other islands and islets whose entire land surface is situated wholly within the region referred to in paragraph (4) of this Article, belong to the Republic of Chile.⁵

Paragraph 4 included the geographical coordinates of six points which determined the arbitration zone, often referred to as "the hammer" on account of its shape.

It was agreed that the Court would decide the case "in accordance with the principles of International Law" (para. 7) and that it would draw the resulting boundary line on a chart (Art. XI).

With the exception of the limits of the two countries' respective claims in Antarctica, the boundaries between Argentina and Chile were fixed by the Treaty of July 23, 1881⁶ which laid down in Article III that:

⁴ The judges selected were: Hardy Dillard (U.S.A.), Sir Gerald Fitzmaurice (U.K.), André Gros (France), Charles D. Onyeama (Nigeria), and Sture Petré (Sweden). It has to be stressed that, although their personal qualifications were taken into account, their designation was primarily due to their membership on the ICJ.

⁵ The Chilean question must be read together with the Notes of December 11, 1967 which, in short, sought to establish a procedure against Argentina on the basis of Article V of the 1902 Treaty of Arbitration, i.e., a procedure which empowered the Arbitrator to draft the *Compromiso* without consulting the parties if the latter could not agree on a text (Art. IV of the abovementioned Treaty of 1902). On that occasion Argentina did not accept a procedure of arbitration drawn on such a basis, and new negotiations were opened in 1970 which led to the present *Compromiso*.

⁶ Treaty of Delimitation, signed at Buenos Aires, July 23, 1881, 12 MARTENS, NOUVEAU RECUEIL GÉNÉRAL, 2d ser. 491 (1887).

In Tierra del Fuego a line shall be drawn which, starting from the point named Cabo del Espíritu Santo in latitude $52^{\circ}40'S$, will extend towards the South, following the meridian $68^{\circ}34'W$. of Greenwich until it reaches the Beagle Channel. Tierra del Fuego, thus divided, shall be Chilean in the Western part and Argentine in the Eastern part.⁷

As regards the islands, there shall belong to the Argentine Republic Isla de los Estados, the islets in close proximity to it, and such remaining islands as are on the Atlantic to the East of Tierra del Fuego and eastern coasts of Patagonia; and there shall belong to Chile all the islands to the South of the Beagle Channel as far as Cape Horn and such as are to the West of Tierra del Fuego.⁸

A difference of opinion arose between the parties as to the course and extent of the Beagle Channel in its eastern part. Chile maintained that the eastern mouth of the channel was situated between Isla Nueva and Isla Grande, thus passing to the north of Picton and Nueva. The three bigger islands were therefore claimed as Chilean on the grounds that they were "south of the Beagle Channel."

Argentina claimed that, due to historical reasons, *i.e.*, the view of the Beagle Channel that the discoverers had, the real mouth lies to the south-west of Picton and passes between this island and Navarino. The three larger islands were, then, in different positions regarding the course of the Channel, but in any case they were not south of it. Besides, and this was the other leg of the Argentine argumentation, the three islands were "on the Atlantic" and consequently appertained to Argentine sovereignty. This was so, first, because of the mention of the islands as being "on the Atlantic" in the "Argentine clause" of Article III, regarding the distribution of islands and, second, because the Treaty of 1881 embodied a principle, derived from the *uti possidetis juris* of 1810, according to which the Atlantic littoral was to be Argentine, and the Pacific littoral, Chilean.⁹

The foregoing outline is a first, and somewhat sketchy, approach to the

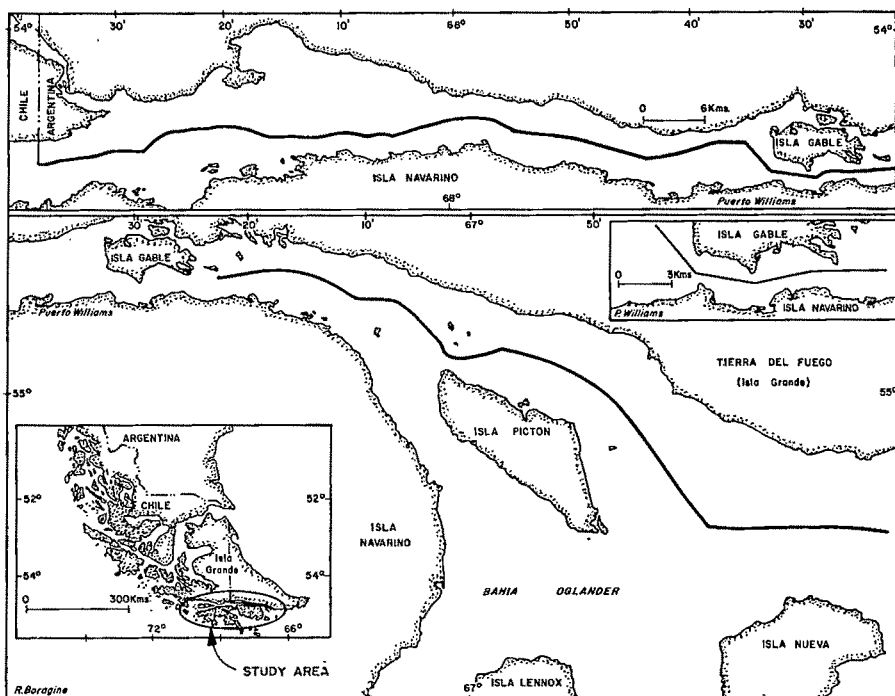
⁷ This meridian was changed to $68^{\circ}38'5$ as a consequence of the 1893 Additional and Explanatory Protocol to the 1881 Treaty.

⁸ The transcribed translation is an Argentine text. The Chilean version differed in some passages. The Spanish text is as follows:

En la Tierra del Fuego se trazará un línea que, par tiendo del punto denominado Cabo del Espíritu Santo en la latitud $52^{\circ}40'$, se prolongará hacia el Sur, coincidiendo con el meridiano occidental de Greenwich $68^{\circ}34'$ hasta tocar en el canal "Beagle". La Tierra del Fuego, dividida de esta manera, será chilena en la parte occidental y argentina en la parte oriental. En cuanto a las islas, pertenecerán a la República Argentina la Isla de los Estados, los islotes próximamente inmediatos a ésta y las demás islas que haya sobre el Atlántico al Oriente de la Tierra del Fuego y costas orientales de la Patagonia; y pertenecerán a Chile todas las islas al Sur del canal "Beagle" hasta el Cabo de Hornos y las que haya al occidente de al Tierra del Fuego.

⁹ In the Argentine contention, this principle was clearly expressed in the Additional and Explanatory Protocol, ratified by the Parties in 1893, in the following manner:

... it being understood that, by the provisions of the same [1881] Treaty, the sovereignty of each State over the respective coastline is absolute, in such a manner that Chile cannot lay claim to any point toward the Atlantic, just as the Argentine Republic can lay no claim to any toward the Pacific.



position of the parties, but it may assist the reader to understand the development of their argumentation.

Both countries presented their case as one of interpretation of the 1881 Treaty. Each expressed the conviction that the letter of the Treaty was clearly in favor of its own thesis but nevertheless had recourse to all the means of interpretation mentioned in Article 31 of the Vienna Convention on the Law of Treaties. And quite naturally so, since the 1881 Treaty was drafted in rather peculiar circumstances and disposed of more than 5000 kilometers of boundaries in only three articles.

The Court decided the following ¹⁰:

(1) That the islands of Picton, Nueva, and Lennox, together with their immediately "appurtenant" islets and rocks, belong to the Republic of Chile;

(2) That a line drawn on an attached chart ¹¹—which formed an integral part of the decision—constituted the boundary between the territorial and maritime jurisdictions of Argentina and Chile;

(3) That, within the area of the "hammer," the title to all islands, islets, reefs, banks, and shoals is vested in Argentina if situated to the northern side, and in Chile if situated to the southern side, of that line;

(4) That in so far as any special steps need to be taken for the execution of the decision, they shall be taken by the parties, and that the decision

¹⁰ Taken from the "Report and Decision of the Court of Arbitration rendered to Her Britannic Majesty's Government in the United Kingdom" (hereinafter cited as Report).

¹¹ See *supra*.

shall be executed within a period of nine months from the date on which, after ratification by the British Government, it is communicated by the latter to the parties.

(5) That the Court continues in being until it has notified the British Government that, in its opinion, the Award has been materially and fully executed.

The decision itself may be divided into two important parts. The first deals with the Court's interpretation of the text of the 1881 Treaty and the second with the "corroborative or confirmatory incidents and material." Both parts are fairly extensive, the first being by far the most important.

The Court considered it necessary to determine the scope and meaning of the term "Beagle Channel" as used in the 1881 Treaty and said that it could not differentiate "the two arms into waterways of distinct categories, one being a channel (or part of one) and the other not."¹² Consequently, it set out to establish which arm was "the treaty arm," i.e., which was the arm of the channel that the negotiators of the 1881 Treaty had in mind. The Court concluded that the "treaty arm" was the northern one, which passes north of the islands of Picton and Nueva. Consequently, the three islands at the mouth were "south of the Channel" and Chilean.

Regarding the "Atlantic principle" invoked by Argentina on the basis of the 1810 *uti possidetis juris* doctrine, the Protocol of 1893, and the text of Article III of the 1881 Treaty that allocated to Argentina the islands "on the Atlantic, to the East of Tierra del Fuego and eastern coasts of Patagonia," the Court concluded that there was no overriding principle which determined that all the Atlantic coasts were to be Argentine, but rather that "... any Atlantic motivations are to be given effect to only in respect of the individual articles that clearly show this intention by reason of their method of drafting or content."¹³ Article III, the Court said, did not refer to islands situated to the south of Isla Grande de Tierra del Fuego; therefore, Picton, Nueva, and Lennox were not to be considered as Argentine.

The islands within the Channel are numerous and important from the viewpoint of navigation. The Court concerned itself with the small islands—relatively small, since one of them, Gable, is of some size—lying within the Beagle Channel proper and forming part of the arm that the Court found to be "the treaty arm," that is, the northern one. In fact, the Court followed the line claimed by Argentina, as drawn in a chart presented by that party, as far as a point in mid-channel somewhat to the east of Snipe Island. Then it followed a different course, allocating Snipe to Chile and the Becasses Islands to Argentina.

Here is how the Court explained the drawing of the line:

The boundary line itself is the resultant of construction lines drawn between opposite, shore to shore, points, sometimes to or from straight baselines. It is in principle a median line, adjusted in certain relatively unimportant respects for reasons of local configuration or of

¹² Report, *supra* note 10, at 94.

¹³ *Id.* 77.

better navigability for the Parties. Over the whole course, account has been taken of sand-banks, siltings, etc., which would make a strict median line unfair, as in the case of certain islets or rocks.¹⁴

In the part of the decision dealing with "confirmatory or corroborative incidents and material," the Court considers several matters which, in its opinion, confirm the conclusions reached before. But it is clearly stated that the substantive conclusions are not based on such "confirmatory" or "corroborative" evidence.¹⁵ The conduct of the parties during the period 1881-1888 was considered by the Court as providing an important indication of their interpretation of the Treaty. Within this context, the statements by the Argentine and Chilean Foreign Ministers on the occasion of their presentation of the Boundary Treaty to the respective Congresses for consent were analyzed by the Court. The statement by Argentine Minister Bernardo de Irigoyen was considered at some length. Certain charts and maps issued during the period 1881-1888, the value of which had been strongly questioned by Argentina, were nevertheless deemed relevant to assess the intentions of the negotiators of the Treaty.

Finally, regarding certain acts of jurisdiction—mostly land or mining concessions—performed by Chile from 1892 onwards, the Court said:

The Court does not consider it necessary to enter into a detailed discussion of the probative value of acts of jurisdiction in general. It will, however, indicate the reasons for holding that the Chilean acts of jurisdiction, while in no sense a source of independent right, calling for express protest on the part of Argentina in order to avoid a consolidation of title, and while not creating any situation to which the doctrines of estoppel or preclusion would apply, yet tended to confirm the correctness of the Chilean interpretation of the islands clause of the Treaty.¹⁶

Judge André Gros drafted a declaration which was annexed to the decision. Although he had arrived at the same conclusion as the Court regarding the interpretation of the text of Article III, he had a "different appraisal of the use to be made of cartography and the acts of the Parties subsequent to the Treaty."¹⁷

The Parties having chosen in 1876 and 1881 not to make any map, or even a sketch of the frontier in the islands, the Treaty is therefore, a treaty without a map. After the Treaty no map at all became the subject of a joint discussion or study during the progress of the dispute, or which could in my view be used to elucidate the meaning of a provision of the Treaty . . .

Regarding the Court's study of the cartography of the case, Judge Gros said:

Personally, while recognizing the interest and utility of that study, I would point out, on the one hand, that it was not necessary from the legal point of view . . . and, on the other, that the Parties them-

¹⁴ *Id.* 248, Annex IV, "The Tracing of the Boundary line."

¹⁵ *Id.* 126.

¹⁶ *Id.* 194.

¹⁷ *Id.* 210.

selves, at the time of the Treaty and in the years which followed, attached to that same non-concordant cartography only a minimal degree of interest. . . .

He concluded that:

. . . no act imputable to one of the States can compromise that frontier [that established by the 1881 Treaty] whether or not with intention to modify it, and it is difficult to see what effect such a unilateral act could have on the treaty rights of the other state, if those rights exist by virtue of the Treaty—and if they do not exist, cadit quaestio.¹⁸

Neither could he

. . . follow the Court in its views concerning the conduct of the Parties after the Treaty, which is equally lacking in relevance, if account is taken of the Treaty relations and general principles of law binding on the Parties in the period under consideration.¹⁹

The British Government issued a declaration on April 18, 1977, whereby the decision of the Court was ratified and declared to constitute the Award in accordance with the 1902 Treaty.

F. V.

THE 1976 AMENDMENTS TO THE FISHERMEN'S PROTECTIVE ACT

Theodor Meron, writing in this *Journal* in 1975¹ examined the U.S. Fishermen's Protective Act² and concluded that "[s]hould Congress adopt the proposals for unilateral extension of U.S. fishery zones, the Fishermen's Protective Act would wither away or be repealed."³ The United States extended its fisheries conservation and management authority to a zone extending 200 nautical miles from the coast in 1976.⁴ Surprisingly, the legislation by which this was accomplished actually broadened the coverage of the Fishermen's Protective Act.⁵ And it did so in a most objectionable way.

It will be recalled that the Fishermen's Protective Act provides for reimbursement to U.S. fishermen for certain costs incurred under specified circumstances when their vessels are seized by foreign nations while engaged in fishing off a foreign nation's coast. Prior to the 1976 amendments, the Act provided for reimbursement only where "a vessel of the United States is seized by a foreign country on the basis of rights or claims in territorial waters or the high seas which are not recognized by the United States . . . and there is no dispute of material facts with respect to the

¹⁸ *Id.* 211.

¹⁹ *Id.* 212.

¹ Meron, *The Fishermen's Protective Act: A Case Study in Contemporary Legal Strategy of the United States*, 69 AJIL 290 (1975).

² 22 U.S.C. §§1971-79 (Supp. 1974).

³ Meron, *supra* note 1, at 309.

⁴ 16 U.S.C. §1801 *et seq.* (Supp. 1976), 15 ILM 634 (1976). (Originally enacted as Fishery Conservation and Management Act of 1976, 90 Stat. 331 *et seq.*).

⁵ 22 U.S.C. §1972 (Supp. 1976) (Originally enacted as Fishery Conservation and Management Act of 1976, §403, 90 Stat. 360).

location or activity of such vessel at the time of such seizure.”⁶ In such circumstances, a reimbursement would follow to the vessel owners for the amount of a fine, license fee, registration fee, or any other direct charge that is actually paid in order to secure the prompt release of the vessel and crew.⁷ Thereafter, the Secretary of State is instructed to notify the foreign country that effected the seizure of any reimbursement made and to “take such actions as he deems appropriate” to pursue an international claim against the foreign country.⁸

As Meron pointed out, so far as the U.S. Government was concerned,

[T]he motivation for the Fishermen's Protective Act was the fear that, should the U.S. fishing industry abstain from fishing off the coasts of the seizing countries, the rights and positions of the United States in the jurisdictional disputes between the Government of the United States and the Government of the Latin American countries concerned (and, potentially other countries, such as Canada) would be adversely affected. Hence the need to reimburse the owners of fishing vessels for losses suffered, and to encourage them not to change their fishing practices by moving to less productive but safer waters.⁹

The “rights and positions of the United States” here refer to the well-known opposition of the United States to claims of 200-mile territorial seas made by several Latin American states. As indicated in the Agreement of 1975 between the United States and Brazil Concerning Shrimp,¹⁰ the Government of the United States considered “that it is not obligated under international law to recognize territorial sea claims of more than three nautical miles nor fisheries jurisdiction of more than 12 nautical miles from the coast,” and that freedom of fishing on the high seas prevails seaward of these limits.”¹¹

Of course, the legal purposes of the Act were accompanied by economic purposes—the financial interests of the U.S. shrimp, tuna, and other fishing industries that rely on fish from foreign coastal waters benefited from the

⁶ 22 U.S.C. §1972 (1970).

⁷ 22 U.S.C. §1973 (1970). The 1976 amendments also elaborated the meaning of “other direct charge” in this section by adding:

For the purposes of this section, the term “other direct charge” means any levy, however characterized or computed (including, but not limited to, any computation based on the value of a vessel or the value of fish or other property on board a vessel), which is imposed in addition to any fine, license fee, or registration fee.

Fishery Conservation and Management Act of 1976, §403, 90 Stat. 360.

⁸ 22 U.S.C. §1975 (1970). The language “such action as he deems appropriate” leaves discretion with the Department of State as to whether an international claim should be pursued at all in any specific case. To construe the section as mandating an international claim would pose constitutional problems concerning congressional intrusion in the executive's exclusive power to conduct foreign affairs. See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 93 (1972). In light of the 1976 amendments to the Act, this is the only reasonable construction since some incidents that would result in reimbursement under the Act would not establish the basis for an international claim in any event. Indeed, it is questionable whether the United States should routinely notify a foreign government that reimbursements have been made in light of the discussion that follows.

⁹ Meron, *supra* note 1, at 299.

¹⁰ Mar. 14, 1975, TIAS No. 8253, 14 ILM 909 (1975) (effective Mar. 22, 1976).

¹¹ *Id.*, Preamble.

reimbursement and the U.S. consumer benefited from the continued flow of shrimp, tuna, and other fish from distant waters.¹²

The Fisheries Conservation and Management Act of 1976¹³ extended U.S. fishery management authority to 200 miles over living resources other than tuna¹⁴ and amended the Fishermen's Protective Act to broaden the availability of reimbursements. In addition to the situation giving rise to reimbursement prior to the 1976 amendments, reimbursement is now available if

any general claim of any foreign nation to exclusive authority is recognized by the United States, and any vessel of the United States is seized by such foreign country on the basis of conditions and restrictions under such claim, if such conditions and restrictions

(a) are unrelated to fishery conservation and management,

(b) fail to consider and take into account traditional fishing practices of vessels of the United States,

(c) are greater or more onerous than the conditions and restrictions which the United States applies to foreign fishing vessels subject to the fishery management authority of the United States (as established in Title I of the Fisheries Conservation and Management Act of 1976), or,

(d) fail to allow fishing vessels of the United States equitable access to fish subject to such country's exclusive fishery management authority.¹⁵

The United States now recognizes that coastal state fishery conservation and management authority within a zone extending 200 nautical miles from the coast is legitimate under international law, except in respect to tuna.¹⁶ Thus, reimbursement is now available to U.S. fishermen whose vessels are seized while fishing within 200 miles of a foreign nation's coast under a number of circumstances, even though the United States recognizes the fishery management authority pursuant to which the seizure is made. In other words, where the Fishermen's Protective Act previously relied on the fact of an *illegal* seizure (as a matter of international law, as perceived by the United States) as justification for the reimbursement, the 1976 amendments require reimbursement in certain cases where the seizure must be regarded as *legal* (as a matter of international law, as perceived by the United States).

For example, the third situation in which reimbursement is available—when the seizure is based on conditions and restrictions that are “greater or more onerous” than those applied by the United States on foreign vessels fishing off the U.S. coast—suggests that the manner in which the United States chooses to exercise its newly acquired jurisdiction establishes a norm that defines the maximum control to which American fishermen ought to submit when fishing off the coasts of other nations. Management condi-

¹² See Meron, *supra* note 1, at 291.

¹³ Note 4, *supra*.

¹⁴ 16 U.S.C. §1813 (Supp. 1976).

¹⁵ 22 U.S.C. §1972 (Supp. 1976).

¹⁶ Fisheries Agreement with Mexico, Nov. 24, 1976, Preamble; Agreement with Brazil Concerning Shrimp, Mar. 1, 1977, Preamble, TIAS No. 8559 (effective May 1, 1977).

tions and restrictions more onerous than those actually imposed by the U.S. Government may, however, be well within the legitimate jurisdiction of other coastal states. When the United States recognizes that a 200-mile fisheries jurisdiction is legitimate under international law, it is surely disingenuous to assert that its own fisheries conservation and management practices set a limit on the discretion entailed in the concept of jurisdiction.

The Fishermen's Protective Act previously encouraged American distant-water fishermen to continue to fish in the face of a threat of "illegal" seizure in order to preserve the U.S. position under international law. The recent amendments, however, also encourage American distant-water fishermen to continue to fish in the face of a threat of "legal" seizure, where there is no longer a legal position to be protected by continued fishing. The American taxpayer is thus in the position of promoting illegal behavior by the American distant-water fisherman by paying such costs of the illegal behavior as may be imposed by foreign nations in the form of fines or other monetary penalties.

The effect of this anomalous policy is partially to deprive the foreign nations concerned of the enforceability of their laws by removing the deterrent effect of the financial sanctions. It is true that the seizure of a fishing vessel entails considerable expense to the owner in terms of lost fishing time, but this is at least partially offset by the fact that surveillance and enforcement are often uneven off foreign coasts. The risk of seizure may accordingly be acceptable from a business standpoint as a result of reimbursements under the Fishermen's Protective Act. At least, such is the assumption of the Act.

To the extent that foreign nations rely on deterrence to effect compliance with their laws, the reimbursement of fines and other monetary penalties by the U.S. Government may lead them in two directions. First, foreign nations could turn to sanctions, such as imprisonment, for which reimbursement could not be provided. Second, foreign nations could engage in a practice of delaying the release of seized vessels so as to increase the cost to the owner in lost fishing time. Both of these options are highly unpalatable to distant-water fishermen. Indeed, the Revised Single Negotiating Text of the Third United Nations Conference on the Law of the Sea includes an obligation for the coastal state promptly to release arrested vessels and their crews upon the posting of bonds¹⁷ and a prohibition on imprisonment for violations of fisheries regulations¹⁸ in order to prevent such practices. Until a new law of the sea treaty enters into force for the relevant states or these obligations become part of the customary law through state practice, reimbursements under the 1976 amendments will tend to defeat efforts to make these norms a part of the applicable law.¹⁹

As a less likely possibility, a foreign nation might actually find it desirable to encourage illegal fishing so as to effect an indirect wealth transfer from

¹⁷ UN Doc. A/CONF.62/WP.8/Rev.1 (1976), Part II, Art. 61, para. 2.

¹⁸ *Id.* Art. 61, para. 3.

¹⁹ In this connection, it should be noted that U.S. law provides for imprisonment of foreign fishermen for violations of fisheries regulations. 16 U.S.C. §1859 (Supp. 1976).

the U.S. Treasury to its own. De facto collusion between the foreign nation and U.S. fishermen is possible so that the risk of seizure, and therefore lost fishing time, is kept low enough so that it is attractive for the Americans to fish illegally while it is high enough to produce compensating revenue to the foreign government. This might be most likely in respect of nations where monetary penalties for fishing violations are earmarked for the budget of the enforcement agency.

In economic terms, additional criticisms can be levelled at the 1976 amendments. The amendments do benefit the relevant fishing industries and encourage the continued flow of fish and seafood to the United States from distant waters. But the cost entailed in paying monetary penalties to foreign governments is borne by all taxpayers, where the absence of reimbursement would place it on the relevant consumers in the price of the fish and fish products. The justification for this wealth transfer from all taxpayers to consumers of certain fish and fish products is now unclear. When the object of the reimbursement was to protect the national law of the sea position, some justification was at least conceivable. Now that the object is, except in respect to tuna, solely to benefit an industry and consumers of its products, the justification is at best obscure.

The legal theory of the Fishermen's Protective Act has been turned upside down by the 1976 amendments. The result could encourage foreign nations to resort to sanctions more oppressive to the fishermen than fines, such as imprisonment or delayed release of arrested vessels and their crews. At worst, a pattern of illegal behavior could develop that results in a simple transfer of the American taxpayer's money to foreign treasuries. In any event, the amendments result in an unjustified wealth transfer from the general taxpayer to consumers of fishery products from distant waters. The 1976 amendments to the Fishermen's Protective Act should be repealed and the remainder of the Act allowed to wither away as the trend to greater coastal state fisheries jurisdiction removes any dispute based on differing perceptions of international law.

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CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters shall be published and to edit any letters printed.

Security Council Resolution 242
June 24, 1977

TO THE EDITOR-IN-CHIEF

In a recent note in this *Journal*, Mr. Toribio de Valdés,¹ wrote that I had implied in my earlier article in this *Journal*² on the Arab oil embargo that

¹ de Valdés, *The Authoritativeness of the English and French Texts of Security Council Resolution 242 (1967) on the Situation in the Middle East*, 71 AJIL 311 (1977).

² Shihata, *Destination Embargo of Arab Oil: Its Legality under International Law*, 68 AJIL 591-627 (1974).

the English text of Security Council Resolution 242 of November 22, 1967³ should, for purposes of interpretation, enjoy some measure of precedence over the French version. Rejecting this presumed implication, Mr. de Valdés argued that "the French version of the resolution carries, in every respect, just as much weight as its English counterpart." I could not agree more with Mr. de Valdés's conclusion. This comment is meant only to refute his finding that the contrary was implied in my article.

The contention made in my article was that the problem of multilingual interpretation was, in the first place, irrelevant in the context of Resolution 242, as the English text of that resolution cannot objectively mean other than the total withdrawal of Israeli forces mentioned also in the French version. The reasons for this contention are:

(1) The English text describes the territories from which withdrawal is required as those "occupied in the recent conflict" without any exception.

(2) The English text mentioned withdrawal of "Israel armed forces," not "the" Israel forces, without meaning of course that some Israeli forces will remain in every area from which these forces withdraw.

(3) The resolution separated the withdrawal issue and the issue of secure boundaries as it required withdrawal *from* occupied territories and not *to* secure boundaries. Security of boundaries is a relative matter that can mean different things to different parties. The language of the resolution does not relate withdrawal to such a relative and personal concept. Rather, it rightly affirms that the establishment of a just and lasting peace includes the application of the right of every state in the region to live in peace within secure and recognized boundaries, with the assumption that these will eventually be accepted by all the parties concerned.

(4) Any reading which interprets the resolution to mean less than complete withdrawal from all occupied territories imparts to the resolution a meaning which runs contrary to the basic principles of the United Nations, embodied in the resolution itself, relating to the inadmissibility of the acquisition of territory by war and the territorial integrity of every state. Furthermore, such a reading would fly in the face of the consensus of the international community. It reaches the point of absurdity by insisting that the integrity of states, their history, and geography, depend on the presence, or absence, of a definite article which is not even needed grammatically to convey the required comprehensive meaning.

In the light of the above, the question of multiple interpretation seemed to me to have no bearing on the interpretation of Resolution 242. The fact that some international lawyers have raised this question in defense of the political aims of the expansionist trend in Israel, and that the media have later made it a popular issue, does not in itself make it an issue that has to be tackled in a serious treatment of the Arab-Israeli conflict. To say that the issue is irrelevant, does not imply, however, that one version carries more or less weight than the other.

IBRAHIM F. I. SHIHATA

TO THE EDITOR-IN-CHIEF

June 21, 1977

The note by Toribio de Valdés, *The Authoritativeness of the English and French Texts of Security Council Resolution 422 (1967) on the Situation in the Middle East*,¹ is a classic instance of the error of literalness

³ 22 SCOR, RES. & DEC. 8 (1967), 62 AJIL 482 (1968).

¹ 71 AJIL 311 (1977).

in the interpretation of legal documents. All United Nations resolutions appear in all the official languages of the United Nations, and they are indeed official. But not all languages have the same capacity to express "the plain meaning" of those who negotiated, drafted, debated, and finally adopted a particular resolution. Security Council Resolution 242 was drafted, discussed, debated, and adopted in English. I reviewed the legislative history of the "missing" word "the" in this *Journal* in my article *The Illegality of the Arab Attack on Israel of October 6, 1973*.² Those pages treat the problem of translating the final English text into French, and report some of the diplomatic conversations which took place on the subject. At the time, we found no way to express the meaning of the English text in French, Spanish, or Russian. I am surprised that Mr. Toribio de Valdés did not address this material in his article.

EUGENE V. ROSTOW
Yale Law School

Mr. de Valdés replies:

With regard to Professor Rostow's comments, I wish to observe, first, that my note postulates the validity of the Spanish legal aphorism according to which "whatever is not in the records is not in this world" (*lo que no está en los autos no está en el mundo*). I believe that the full applicability of the principle underlying this colorful saying to the use of *travaux préparatoires* as a subsidiary means of interpreting treaties and decisions of international organs is beyond dispute. Accordingly, of the expressions of opinion that Professor Rostow cites in the relevant part of his article the only ones that can, in my view, carry any weight in interpreting Security Council Resolution 242 are those taken from the official records. This being so, I wish to point out that, in my considered opinion, neither these nor any other elements of the *travaux préparatoires* invalidate the last (parenthesized) sentence of footnote 6 of my note to the effect that those *travaux préparatoires* do not reveal the intention of the Council as to whether withdrawal under operative paragraph 1 (i) of the resolution was meant to be total or not. I would observe further that, since the Council did not, in considering and voting on the proposal that became Resolution 242, in any way deviate from its rules of procedure concerning working languages, Professor Rostow's assertion in his rebuttal of my note that the resolution "was . . . adopted in English" is factually incorrect, the resolution having been adopted, on a footing of complete equality, in both English and French. (I might add, incidentally, that I am surprised by Professor Rostow's reference to the Spanish and Russian versions of the resolution; since these two languages were, at the time, official but *not* working languages, the texts of the resolution in Spanish and in Russian, not having been submitted to the vote, carry no weight for purposes of interpretation.) Professor Rostow's assertion that the resolution was "drafted, discussed, [and] debated . . . in English" can be correct only with respect to actions and negotiations that, having been conducted informally and in private, are not reflected in the official records, on which alone any interpretation based on *travaux préparatoires* can rest.

With respect to Dr. Shihata's remarks, I now realize that my having attributed to him the implied judgment to which he takes exception rested on a misreading, which I regret, of footnote 70 (68 AJIL 604 (1974)) of

² 69 AJIL 272, at 282-86 (1975).

his article on the Arab oil embargo.¹ (I would add however, by way of extenuation, that readers of my note can hardly have been misled into believing that its subject is within the thrust of Dr. Shihata's article, for footnote 1 of my note makes it clear that the implied judgment that I incorrectly laid to him is confined to a footnote of his article.)

TO THE EDITOR-IN-CHIEF

*Legal Effects of
Unilateral Declarations*

Professor Rubin's characteristically carefully researched and thoughtful study in the January issue of this *Journal*¹ is troubling in the somewhat pessimistic tone of its concluding paragraphs. Thus—"the supporters of such a rule must consider whether its cost is not too heavy for the international order to bear. . . . It is distressing to find the ICJ itself playing a role in this evolution" (p. 30).

In its actual application by the contemporary Court, first in the *Nuclear Tests* cases² discussed at length by Professor Rubin, the rule seems to have been used with a large element of pragmatism to correct the then already evident unfortunate political consequences of the Court's earlier majority, eight to six, decision in the same case on the indication of interim measures of protection³—a decision rendered in the absence, through illness, of the then President of the Court and one other key judge. In effectively reversing the interim measures decision in its final judgment on *Nuclear Tests*, the Court majority, by its nine to six decision, in the words of one of the majority judges, Judge Ignacio-Pinto, in his separate opinion, "rightly puts an end to a case one of whose consequences would, in my opinion, be disastrous . . . and would thereby be likely to precipitate a general flight from the jurisdiction of the Court. . . ." ⁴ It is true, as Professor Rubin points out, that the key dictum of the Court's judgment in *Nuclear Tests* on unilateral declarations of intention,⁵ does not command the express support of three of the nine majority judges (Judges Forster, Gros, and Petrán); although Professor Rubin perhaps exaggerates the degree of dissatisfaction of Judge Ignacio-Pinto who does, after all, in terms accept that rationale. The point is, nevertheless, that however unsatisfactory final judgment in the *Nuclear Tests* cases may be to common law students in search of a *ratio decidendi*, any more or less *avant-garde* international law proposition that can command the support of six judges on the contemporary Court, which has been undergoing rapid transition since the "watershed" eight to seven majority decision in *South West Africa* in 1966, may not be doing too badly. The most recent judgments of the Court reflect, in fact, serious philosophical conflicts and also widely different conceptions of the scope of the judicial office and of judicial legislation generally—something that shows up in the plethora of individual judicial opinions, both dissenting and specially concurring, present even in cases decided in voting terms by near unanimity and in the consequent difficulty in extracting clear, agreed majority principles from those cases.⁶

¹ What the footnote does imply (and which led to my error) is that Security Council Resolution 242 (1967) was adopted exclusively in English.

² Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AJIL 1 (1977).

³ [1974] ICJ REP. 253

⁴ [1973] ICJ REP. 135.

⁵ [1974] ICJ REP. 311.

⁶ *Id.* 267.

⁷ See in this regard this writer's studies *International Law-Making and the Judicial Process*, 3 SYRACUSE J. INT. L. & COMMERCE 9 (1975) (cited by Professor Rubin);

The Court recurs in the *Aegean Sea Continental Shelf* case to the principle of the legal effects of unilateral declarations, and it is an express part of the majority, twelve to one, judgment, although not in fact necessary to the final holding which has already been arrived at, by that stage of the official opinion of Court, on other grounds.⁷ This time, aided in part by changes in Court membership in the interval since the final judgment in the *Nuclear Tests* cases two years before, the judicial doubts are stilled. Legal propositions, once successfully asserted even as an, as yet, minority position can, if they appear rational and useful in the practical case-by-case development of international law, seemingly develop an independent momentum of their own.

There is a clear trend in contemporary international law doctrine, reflected also in other Court jurisprudence, away from juridicial formalism, including, among other things, the old, positivistic insistence that a claimed rule, to deserve the accolade of international law, must fit into one or other of the preordained closed categories of formal sources of international law. This trend is in line with the widespread impatience of our times, which is not limited to Third World jurists, over a conceivably highly conservative body of international law doctrine that is seen to lag too far behind rapidly changing societal conditions in the contemporary world community. Who is to criticize the judicial lawmaker if, in the new spirit of legal and societal change, he looks also to the more informal modes of creation of legal norms and to what the parties actually treat as legally binding on themselves in concrete situations? This is in keeping with the thinking of the Scandinavian and general European realist schools on the notion of law as fact, and it is not too far removed from the tradition once represented in U.S. municipal law by the legal realist movement of the 1920's and 1930's. The Court's approach to judgment in both the *Nuclear Tests* and the *Aegean Sea Continental Shelf* cases reflects, it is submitted, this general innovatory spirit in the invocation and application of the principle of the legal effects of unilateral declarations of intention. In both cases, however, so far from there being support for Professor Rubin's fear that such unilateral statements might be used to the detriment of the states actually making them, all the evidence, both before and after the Court decisions, suggests that those states welcomed the Court's inferring of legal effects in the same spirit of pragmatic realism with which the Court itself approached the problems. As the Court judgment in *Nuclear Tests*, citing the earlier judgment in *Northern Cameroons*,⁸ notes:

The Court . . . sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.

Thus the Court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined.

Judicial Opinion-Writing in the World Court and the Western Sahara Advisory Opinion, 37 ZÅRV 1 (1977); The *Aegean Sea Continental Shelf Case* (Greece v. Turkey) (to be published).

⁷ [1976] ICJ REP. 3, at 8, 10.

⁸ [1963] ICJ REP. 38.

The object of the claim having clearly disappeared, there is nothing on which to give judgment.⁹

EDWARD McWHINNEY
Simon Fraser University, Vancouver

Article 2(7) of the UN Charter
June 16, 1977

TO THE EDITOR-IN-CHIEF

One might imagine that J. S. Watson's interpretation of Article 2(7) of the Charter¹ evinces the nearly logical fancies of an Alice-in-Wonderland "rule" dictated approach to law that Felix Cohen denounced so long ago,² but Watson's highly imaginative argument lacks too often, through its many erroneous twists and turns, the conceptual foundation and consistency that would have made it nearly logical. Like that famous cat, Watson produces a smile without a body.

To demonstrate, let us focus on one of his "very important" points made "against the teleological approach" to interpretation of Article 2. The logic, we are told, is compelling, quite clearly "stated" by the article itself provided "one reads Article 2 in its entirety" (either several times, upside-down, or, apparently, once over lightly). The teleological approach addresses the "purposes" of the United Nations and the UN Charter but, Watson affirms, "Article 1 and its *purposes* is not superior to Article 2 and the *principles* . . . Rather the reverse is true . . ."³ Why are *principles* superior to *purposes*? The answer given is that the words of Article 2 demonstrate that the United Nations and UN members, while acting in pursuit of the *purposes*, must act in accordance with the *principles*. "One cannot get a clearer refutation" than that, we are told.

If one can't, however, then I for one am not convinced. Why the *purposes* have to be superior, or the *principles*, is nowhere explained. I had thought that they were of similar import, but let us pursue the reasoning a bit further. First, it does not seem evident at all that merely because one must act "in accordance with" *principles* while in pursuit of *purposes*, the *principles* are "superior" to *purposes*. Rather they seem of interdependent import. Second, if one does read Article 2 in its entirety, one would discover in paragraph four that one of the "principles" is that members shall refrain from the threat or use of force in any manner inconsistent with the *purposes*. Now I suppose that Watson would argue that these words in Article 2 make the *purposes* "superior" to the *principles* but, again, I am not convinced.

Third, if one investigates the content of the "principles" (e.g., paragraphs 1, 2, and 3), actual or conceptual differences between Article 1

⁹ [1974] ICJ REP. 271-72.

¹ Watson, *Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter*, 71 AJIL 60 (1977).

² Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 807 (1935). Watson's article demonstrates the failure of positivism to address realistic processes of authority, especially the separation of authority from raw power. He also assumes that authority can only exist with the state or some "centralized magisterial organ," thus posing an unrealistic dichotomy. See also Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE STUDIES IN WORLD PUB. ORDER 1 (1974); J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231 (1975).

³ *Supra* note 1, at 71 (emphasis added).

purposes and Article 2 *principles*, much less the preambular "ends" and common (international) interests, seem to fade. All seem, in fact, intertwined. Moreover, Watson is aware of the need to interpret a treaty "in light of its object and purpose" but, quite conveniently, he refuses to apply this precept and to interpret Article 2(7) in light of the objects and purposes of the Charter.

Fourth, the general argument seems to be advanced by an author who is totally unaware of the import of Articles 25, 33(2), 34, 39, 48-49, 92, and 94 of the Charter and Article 36 of the Statute of the International Court of Justice, much less the authority therein demonstrated. Hardly any mention is made of significant developments in UN history (*e.g.*, UN responses to Rhodesia) or the various articles published in this *Journal* and elsewhere which explore relevant patterns of constituted authority.

Finally, expectations that are similar to the purposes in Article 1 are set out or expanded in Article 55. In contrast to much of Watson's reasoning, Article 56 discloses the obligation of member states to take joint and separate action to achieve those *purposes*. To follow Watson's logic, since Article 56 compels member states, while in pursuit of their compliance with the *principles*, to act in accordance with (indeed, to take joint and separate action to achieve) the *purposes*, then "clearly" the purposes are "superior" to the principles.

Whether or not positivism is realistic or a misnamed form of sophistic negativism,⁴ Watson's approach is hardly realistic or useful. Nowhere does he explain why positivism, and not pure speculation, demonstrates that a theory of uninhibited state consent (the *old* Soviet theory) is necessary or superior to the Charter, especially paragraph 2 of Article 2 and Article 56. Nowhere is it written in the Charter that a state member has the authority to interpret in a final, "authoritative" manner any article of the Charter.⁵ In fact, several articles address the interpretive authority of the Court and the Security Council. Even Watson must admit that realism about law demonstrates an emerging authority of the General Assembly⁶ and that numerous patterns of behavior and attitude are inconsistent with his own suppositions;⁷ and so, like that cat and his smile, this negativistic thesis reveals itself as an unreal grin, which likewise should fade away.

JORDAN J. PAUST

⁴ See Paust, *supra* note 2, at 236.

⁵ See Paust & Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AJIL 410, 423 n.58 (1974); and J. Paust, letter, 71 AJIL 508 (July 1977). We term initial state decisions "provisional characterizations." See M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 218-19 (1961).

⁶ *Supra* note 1, at 72 ("completely accurate"); cf. *id.* at 71.

⁷ *Id.* One conveniently deleted pre-Charter case, for example, declares: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question: it depends upon the development of international relations." The oft-cited case is the Advisory Opinion on Nationality Decrees issued in Tunis and Morocco, [1923] PCIJ, ser. B, No. 4 (1923). Further, the analysis at *supra* note 1, at 63 is unconvincing and ignores Articles 25, 33(2), 34, 39, and others. See also *id.* at 65 ("cannot bind a member") and 66 ("neither is the Security Council except for its decisions under Chapter VII"). Watson's approach to state "practice" is also incomplete, rather like focusing on *law violators* as law creators and ignoring more widespread patterns of compliant and norm-creating practice and perspective. See also *supra* note 1, at 65 ("target states") and 70 (South Africa); cf. *id.* at 76 (an apt criticism of "simplistic" approaches to custom).

Professor Watson replies:

July 21, 1977

With regard to Professor Paust's inability to see why purposes or principles should be ranked one over the other, I find myself explaining a rather basic issue of even the most simple normative systems. When norms are in conflict, as are Articles 1 and 2 of the Charter, it is helpful to the decision-making process to rank them in some way. Since Article 1 and Article 2 contain language clarifying their relationship, I thought it would be helpful to point this out. If one chooses to ignore this, then one is left with potentially contradictory norms, which is most unhelpful.

His second point is flawed in that, while Article 2 refers to "The Organization and its Members," Article 2(4) only refers to the "Members" and consequently cannot be used to reverse the relationship established between Article 1 and Article 2 as a whole. Article 2(4) is a limited exception to the basic scheme.

The third point, as I understand it, seems to imply that separate and different legal norms may be treated as though they were the same if, on the whole, they look fairly similar. This is very curious legal reasoning indeed. As to my acknowledged inconsistency in the standards to be used in interpreting Article 2(7) as opposed to other articles, I made the reasons for doing so quite clear.

Professor Paust's fourth point indicates a complete lack of awareness of any difference between a jurisdictional rule which allocates competence as a whole and a rule which allocates competence in specific, limited situations. The fact that one can collect a list of Charter articles in which *some* power is transferred by the members to the Organization does not mean that *all* power has been so transferred. If Article 2(7) were invalid, there would be no need for the articles that he lists. The discussion of Article 56 again suggests the use of a limited exception as proof of the invalidity of the rule that necessitated the exception. Professor Paust's concept of legal reasoning gets curiously and curiously.

Paust wonders whether positivism is really negativism in disguise and refers to my views as "negativistic." The clear import of this is that in his view one should only say positive things about UN law even though it is obvious that the politicization of the Organization has relegated legal questions to a position of relative insignificance and that legal consistency is now only a dim memory. If one is to be confined to positive comment only, then one is playing the role, not of an academic, but of an idealist.

Paust then asks why state consent is so important. The answer is quite simple. One cannot achieve a useful, practical system of international law without state participation, since states are still the wielders of power. This participation is what "consent" ultimately means. Thus if one disregards the importance of state consent the result will be an efficacious system. Professor Paust urges us to look at the "numerous patterns of behavior and attitude" which are inconsistent with my position. As I pointed out in my article (p. 76), attitudes are not sufficiently concrete to form a basis for international law due to the problem of states' using a double standard. Exactly how one is supposed to distinguish a genuine attitude from an insincere one is something that Professor Paust must solve. As to patterns of behavior and his point that I focus on law violators too much, he misses the point of my article completely. Consent is one of the built-in methods in international custom and treaty law whereby it is ensured that the system will tend to be efficacious. What use is there in

deducing from Articles 25, 33(2), 34, 39, 48, 49, 92, and 94 that, for example, human rights are now subject to international jurisdiction despite Article 2(7) when the patterns of behavior include the killing of Indian populations in South America, the jailing and torture of political opponents in dozens of countries, thirty years of apartheid in South Africa, the current excesses in Ethiopia and Cambodia, and the tragicomedy of Uganda? If Professor Paust wishes to stack his list of rarely used articles against such facts and ignore the inability of the international legal system to control them, then it is he, and not I, who's approach is, in his words, "hardly realistic or useful."

J. S. WATSON

TO THE EDITOR-IN-CHIEF

In reviewing *Russian and Soviet Law: An Annotated Catalogue of Reference Works, Legislation, Court Reports, Serials, and Monographs on Russian and Soviet Law*, by William E. Butler, in the July issue of the *Journal* (71 AJIL 578 (1977)), I mistakenly gave the number of titles covered as 250; the correct figure is 1200.

JOHN N. HAZARD

STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

(Act of August 12, 1970; Sec. 3685, Title 39, U.S. Code)

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CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

John A. Boyd *

The material in this section is arranged according to the system employed in the annual *Digest of the United States Practice in International Law*, published by the Department of State.

DIPLOMATIC RELATIONS AND RECOGNITION

(U.S. *Digest*, Ch. 2, §3)

General

In response to a question during his press conference of June 13, 1977, President Carter listed as a goal of his Administration the establishment of normal friendly relations with the fourteen nations¹ which did not have diplomatic relations with the United States when he took office:

... We don't want to be in a position that once a country is not friendly to us, and once they are completely within the influence of the Soviet Union they should forever be in that status.

And as I've already indicated, and named several countries—Somalia, Ethiopia, Iraq, even more controversial nations like Vietnam, Cuba—I want to move as best I can to re-establish normal friendly relationships with those countries.

In some instances, the obstacles are quite severe, as in the case of Cuba and perhaps Vietnam. But I think this is what our Government ought to do. And I would like to have a situation when I go out of office that all the nations in the world have diplomatic relations with us.

We now have 14 who don't, and I've been pursuing this aggressively. . . .²

Cuba

On May 20, 1977, in an interview with out-of-town editors and news directors, President Carter outlined in response to a question the U.S. position concerning the restoration of diplomatic relations with Cuba:

* Office of the Legal Adviser, Department of State.

¹ The fourteen countries with which the United States did not have such diplomatic relations were Albania, Angola, Cambodia, People's Republic of China, Comoros Islands, People's Republic of the Congo, Cuba, Equatorial Guinea, Iraq, North Korea, Mongolia, Rhodesia, Vietnam, and People's Democratic Republic of Yemen.

² 13 WEEKLY COMP. OF PRES. DOC. 880 (June 20, 1977). President Carter first spoke of the normalization of U.S. "relationships with all states which are ready to work with us in promoting global progress and global peace" in his address to the United Nations on March 17, 1977. 76 DEPT. STATE BULL. 330 (1977).

We have had no indication from Castro that Cuba is interested in the restoration of diplomatic relations with us.

When I was first in office . . . , a question was asked . . . about what we hope to achieve in the process of restoring those normal relationships.

One thing that I pointed out was a demonstration by the Cubans of their commitment to the human rights concept, particularly by releasing some of the thousands of political prisoners that they have had incarcerated for a number of years, fifteen to twenty years; secondly, the abstaining by the Cubans of their involvement in the internal affairs of nations, particularly in Africa, and a refraining on their part from disruptive practices in the Caribbean, particularly their insistence that Puerto Rico be independent of us. Of course, we want [the people of] Puerto Rico to make their own decision about what their status should be.

We have successfully concluded a fisheries agreement and a maritime agreement with Cuba. My guess is that in the near future we will have some diplomatic officials in Cuba and some Cuban diplomatic officials in Washington, not in our own embassies, but just as observers.

I don't know what Castro's intentions are. I have had no indication that he wants to proceed any more rapidly than we are proceeding, but those are elements that are very important to us. Of course, what he has asked for is an immediate termination of the embargo, trade embargo, against Cuba as a prerequisite to other negotiations which I think is something that he is not likely to achieve.¹

When one questioner raised the issue of Guantanamo, the President responded that there were "several other obviously very complicated elements in dealing with Cuba."

On June 3, 1977, John H. Trattner, Director of the Office of Press Relations of the Department of State, announced during the daily news briefing the opening of interests sections in Havana and Washington:

The Governments of the Republic of Cuba and the United States of America exchanged notes in New York City on May 30 agreeing to the simultaneous opening of a United States Interests Section in the Embassy of Switzerland in Havana and a Cuban Interests Section in the Embassy of Czechoslovakia in Washington.

This agreement will facilitate communications between the two Governments and will provide a greater range of consular services for the citizens of the two countries than are currently available. This step has the approval of the Governments of Switzerland and Czechoslovakia.

The notes were exchanged by Dr. Pelegrin Torras, Vice Minister of External Affairs for Cuba, and Mr. William H. Luers, Acting Assistant Secretary of State for the United States.²

The U.S. note constituting the agreement, which was negotiated by Terence A. Todman, U.S. Assistant Secretary of State for Inter-American

¹ 13 WEEKLY COMP. OF PRES. DOC. 768 (May 30, 1977).

² Dept. of State News Briefing, DPC 101, June 3, 1977. Dept. of State Press Release No. 256, June 3, 1977.

Relations, and Pelegrin Torras, Cuba's Vice Deputy Minister for Foreign Affairs, follows:

I have the honor to refer to the negotiations that our two delegations have conducted toward establishing an Interests Section of the United States of America in the Embassy of Switzerland in Havana and an Interests Section of Cuba in the Embassy of Czechoslovakia in Washington. We have reached agreement on the functions, personnel, privileges and immunities that both Sections will enjoy on the basis of full reciprocity. Each Interests Section will be headed by a diplomat with the rank of Counselor. The Interests Sections will be able to employ a reasonable number of nationals of the receiving State, in Cuba through the national enterprise CUBALSE, and in the United States through normal employment practices.

Both Sections will be located in those buildings that were occupied by the Embassies of the United States of America in Havana and of the Republic of Cuba in Washington and will be under the protection of the Embassy of Switzerland in Havana and of the Embassy of Czechoslovakia in Washington. Both Interests Sections will be inviolable. Entry will not be permitted without the consent of the heads of the Interests Sections.

Signs on the exterior of the buildings occupied by the Interests Sections will indicate: Embassy of Switzerland in Havana, United States Interests Section, and Embassy of Czechoslovakia in Washington, Cuban Interests Section. The official stationery of both Interests Sections shall be so lettered with the exception of that used for internal communications.

No flags nor national seals of either country shall be displayed on the outside of the aforementioned buildings or other properties, except those that are engraved on the buildings, because they are under the protection of other diplomatic missions.

Automobiles and other means of transportation used by the Interests Sections or their employees shall be licensed in the series assigned to the automobiles belonging to the Swiss Embassy in Havana and the Czechoslovakian Embassy in Washington respectively and may only display the flags of those countries.

Official access of the United States Interests Section to the Ministry of Foreign Affairs in Havana and of the Cuban Interests Section to the Department of State in Washington will be at the same level.

The Interests Sections shall have the right of free communication for all official purposes, using open or encrypted diplomatic mail or communications. Official correspondence and diplomatic pouches will be inviolable, in accordance with international practice. The Interests Sections may maintain radio transmitters only with the consent of the host country.

Members of the Interests Sections shall have freedom to travel throughout the territory of the host country in accordance with the established international practice commonly accepted for Embassy personnel. In accordance with Protocol, the Head of each Interests Section shall rank in diplomatic precedence after Charges d'affaires. The Interests Sections may carry out routine diplomatic and consular functions and make their own financial transactions.

Both Governments reconfirm their commitments under the applicable international treaties governing diplomatic and consular relations to which both are parties. Personnel of both Sections shall benefit from the privileges and immunities provided by those treaties.

The names of the diplomats of both Interests Sections will appear in the Diplomatic List, apart from and after those of the diplomats of the Government of Switzerland in the case of the United States and of the Government of Czechoslovakia in the case of Cuba.

The Government of the United States shall obtain the concurrence of the Government of Switzerland and the Government of Cuba shall obtain the concurrence of the Government of Czechoslovakia to this arrangement.

Subject to the preceding paragraph, the opening of the Interests Sections will take place simultaneously in both capitals at a date to be mutually agreed within one month of the date of this exchange of notes.³

In his response to questions concerning this announcement, Mr. Trattner indicated that the agreement on Interest Sections was intended to facilitate discussion of problems and concerns that each country has with the other and not to establish or to normalize relations. Among the obstacles to normal relations remaining to be overcome were such issues as the status of thirty American prisoners being held in Cuba, visitation rights for families divided between Cuba and the United States, the presence of Cuban military advisers in Africa, and U.S. claims for property seized by the Cuban Government. Mr. Trattner noted that the U.S. Foreign Claims Settlement Commission determined in July 1972 that the United States has claims valued at 1.8 billion dollars against Cuba, while Cuba has an undetermined amount of claims against the United States.

In response to a further question, Mr. Trattner indicated that less than a dozen Americans would be stationed in Havana within two or three months pursuant to the agreement.

Mr. Trattner also announced that the Cuban Government had informed the United States on June 3, 1977, that the Cuban Government planned to release ten American prisoners immediately and that the cases of all of the other twenty remaining American prisoners were being reviewed. Mr. Trattner said that seven of the thirty American prisoners were being held for crimes against the state, while the rest were being held for drug-related and hijacking offenses. The ten prisoners being released had been held in connection with drug-related offenses.

SELF-GOVERNING AND NON-SELF-GOVERNING TERRITORIES (U.S. *Digest*, Ch. 2, §5)

Self-Determination

During his talks in Vienna with South African Prime Minister B. John Vorster on May 19-20, 1977, Vice President Walter F. Mondale presented

³ Dept. of State File No. P77 0104-100.

the U.S. positions on Southern Rhodesia, Namibia, and South Africa's internal policies. With regard to Southern Rhodesia, Vice President Mondale gained Prime Minister Vorster's agreement to support Anglo-American efforts to bring the interested parties to agreement on a constitution for Zimbabwe and on transitional arrangements, including independence and peace. As to Namibia, the Vice President stressed the continuing U.S. dedication to the efforts of the five-power contact group, which is composed of the United States, the United Kingdom, France, the Federal Republic of Germany, and Canada, to bring about a settlement in line with UN Security Council Resolution 385. Prime Minister Vorster maintained that the interim authority in Namibia should draw upon the structure developed at the Turnhalle Conference, which stressed ethnic and tribal arrangements. Vice President Mondale indicated that the Turnhalle conference structure was unacceptable to the United States.

Excerpts from the text of Vice President Mondale's statement follows:

. . . Put most simply, the policy which the President wished me to convey was that there was need for progress on all three issues: majority rule for Rhodesia and Namibia and a progressive transformation of South African society to the same end. We believed it was particularly important to convey the depth of our convictions.

.

As for Rhodesia and Namibia, I believe we registered some useful progress but the significance of this progress will depend on future developments. Prime Minister Vorster agreed to support British-American efforts to get the directly interested parties to agree to an independence constitution and the necessary transitional arrangements, including the holding of elections in which all can take part equally, so that Zimbabwe can achieve independence during 1978 and peace.

.

I explained that our concept of the Zimbabwe Development Fund is different from that of the previous American Administration. Instead of being a fund aimed at buying out the white settlers in Rhodesia, we want to reorient that fund to a development fund—one that will encourage the continued participation of the white population in an independent Zimbabwe. . . .

On Namibia I made clear that we supported the efforts of the so-called contact group—which consists of the United States, West Germany, Britain, France, and Canada—in their efforts to implement Security Council Resolution 385. In some respects the position of the South African Government, as reflected in the earlier talks, was encouraging. In those talks they agreed to free elections to be held on a nationwide basis for a constituent assembly which would develop a national constitution for an independent Namibia. They agreed that all Namibians inside and outside the country could participate, including SWAPO [South West Africa People's Organization]. They agreed that the United Nations could be involved in the electoral process to assure that it was fair and internationally acceptable.

However, potentially important differences over the structure and character of the interim administrative authority that would run

Namibia while this process takes place became much clearer in the process of our talks. South Africa wants an administrative arrangement that draws upon the structure developed at the Turnhalle conference [South African-sponsored constitutional conference held in Windhoek, Namibia, beginning September 1975]. This structure, in the conference that proposed it, is based on ethnic and tribal lines, and as it stands it is unacceptable to us. We emphasized that any interim administrative arrangement must be impartial as to the ultimate structure of the Namibian government. Moreover, it must be broadly representative in order to be acceptable to all Namibians and to the international community.

For his part Mr. Vorster felt quite strongly that any such structure should be based on the work of the Turnhalle conference. We agreed to propose that the five-nation contact group meet with the South African Government before the end of the month in Capetown, at a time to be determined if the other members of that group agree to hear South Africa's views and the details of the proposed interim administrative authority, to see if an impartial broadly based and internationally acceptable structure can be found. We hope that it can be.

It is my view that the South African position on Namibia is involved in a positive direction in certain important respects. But unless this last issue can be satisfactorily resolved by the South African Government, fair free elections will be difficult if not impossible. I hope that the most serious effort will be made to find a solution that provides an impartial broadly representative and internationally acceptable interim authority in Namibia.

I also raised the question of political prisoners with regard to Namibia. I said that the United States believes that all political prisoners should be released. Mr. Vorster said he believes that what he called political detainees, some of which are held in other African countries, should be released. He said he would favorably consider our suggestion that all Namibian political prisoners be turned over to Namibia and that, in the event of a difference in view of whether a particular prisoner was political or criminal, a body of international jurors review the case and make a determination. This suggestion will be pursued as well when the contact group meets in Capetown.

South African prospects are much less bright for progress toward the change of course which we believe is essential to provide justice, stability, and peace in that country. We hope that South Africa will carefully review the implications of our policy and the changed circumstances which it creates. We hope that South Africans will not rely on any illusions that the United States will, in the end, intervene to save South Africa from the policies it is pursuing, for we will not do so.¹

PROTECTION OF HUMAN RIGHTS (U.S. Digest, Ch. 3, §6)

General

In his first public speech after becoming Secretary of State, Cyrus Vance gave a comprehensive statement concerning human rights and U.S. foreign

¹ 77 DEPT. STATE BULL. 1982 (1977). For Vice President Mondale's answers to question concerning *apartheid* in South Africa, see *infra* p. 761.

policy at the Law Day ceremonies at the University of Georgia in Athens on April 30, 1977:

I speak today about the resolve of this Administration to make the advancement of human rights a central part of our foreign policy.

.....

Let me define what we mean by "human rights."

First, there is the right to be free from governmental violation of the integrity of the person. Such violations include torture; cruel, inhuman or degrading treatment or punishment; and arbitrary arrest or imprisonment. And they include denial of fair public trial, and invasion of the home.

Second, there is the right to the fulfillment of such vital needs as food, shelter, health care and education. We recognize that the fulfillment of this right will depend, in part, upon the stage of a nation's economic development. But we also know that this right can be violated by a government's action or inaction—for example, through corrupt official processes which divert resources to an elite at the expense of the needy, or through indifference to the plight of the poor.

Third, there is the right to enjoy civil and political liberties—freedom of thought; of religion; of assembly; freedom of speech; freedom of the press; freedom of movement both within and outside one's own country; freedom to take part in government.

Our policy is to promote all these rights. They are all recognized in the Universal Declaration of Human Rights, a basic document which the United States helped fashion and which the United Nations approved in 1948. There may be disagreement on the priorities these rights deserve. But I believe that, with work, all of these rights can become complementary and mutually reinforcing.

.....

Since 1945, international practice has confirmed that a nation's obligation to respect human rights is a matter of concern in international law.

Our obligation under the United Nations Charter is written into our own legislation. For example, our Foreign Assistance Act now reads: "a principal goal of the foreign policy of the United States is to promote the increased observance of internationally recognized human rights by all countries."

In these ways, our policy is in keeping with our tradition, our international obligations and our laws.

In pursuing a human rights policy, we must always keep in mind the limits of our power and of our wisdom. A sure formula for defeat of our goals would be a rigid, hubristic attempt to impose our values on others. A doctrinaire plan of action would be as damaging as indifference.

We must be realistic. Our country can only achieve our objectives if we shape what we do to the case at hand. In each instance, we will consider these questions as we determine whether and how to act:

1. First, we will ask ourselves, what is the nature of the case that confronts us? For example,

—What kind of violations or deprivations are there? What is their extent?

—Is there a pattern to the violations? If so, is the trend toward concern for human rights or away from it?

—What is the degree of control and responsibility of the government involved?

—And, finally, is the government willing to permit independent, outside investigation?

2. A second set of questions concerns the prospects for effective action:

—Will our action be useful in promoting the overall cause of human rights?

—Will it actually improve the specific conditions at hand? Or will it be likely to make things worse instead?

—Is the country involved receptive to our interest and efforts?

—Will others work with us, including official and private international organizations dedicated to furthering human rights?

—Finally, does our sense of values and decency demand that we speak out or take action anyway, even though there is only a remote chance of making our influence felt?

3. We will ask a third set of questions in order to maintain a sense of perspective:

—Have we steered away from the self-righteous and strident, remembering that our own record is not unblemished?

—Have we been sensitive to genuine security interests, realizing that outbreak of armed conflict or terrorism could in itself pose a serious threat to human rights?

—Have we considered *all* the rights at stake? If, for instance, we reduce aid to a government which violates the political rights of its citizens, do we not risk penalizing the hungry and poor, who bear no responsibility for the abuses of their government?

If we are determined to act, the means available range from quiet diplomacy in its many forms, through public pronouncements, to withholding of assistance. Whenever possible, we will use positive steps of encouragement and inducement. Our strong support will go to countries that are working to improve the human condition. We will always try to act in concert with other countries, through international bodies.

In the end, a decision whether and how to act in the cause of human rights is a matter for informed and careful judgment. No mechanistic formula produces an automatic answer.

It is not our purpose to intervene in the internal affairs of other countries, but as the President has emphasized, no member of the United Nations can claim that violation of internationally protected human rights is solely its own affair. It is our purpose to shape our policies in accord with our beliefs, and to state them without stridency or apology, when we think it is desirable to do so.

.....

We are embarked on a long journey. But our faith in the dignity of the individual encourages us to believe that people in every society, according to their own traditions, will in time give their own expression to this fundamental aspiration.¹

¹ 76 DEPT. STATE BULL. 505-08 (1977).

Racial Discrimination

When responding to questions after his talks in Vienna with Prime Minister B. John Vorster on May 19–20, 1977, Vice President Mondale said that he had told the Prime Minister of South Africa that the United States considered it essential that South Africa make meaningful progress toward the elimination of racial discrimination and toward full political participation by all South Africans on an equal basis. The Vice President said that failure to make real progress toward these objectives would inevitably lead to a worsening of U.S.–South African relations, which the United States would not wish to see.

Pertinent portions of Vice President Mondale's remarks follow:

On the issue of South African policies, it is our position that separateness and *apartheid* are inherently discriminatory and that that policy of *apartheid* cannot be acceptable to us. We also are of the opinion strongly held that full political participation by all the citizens of South Africa—equal participation in the election of its national government and its political affairs—is essential to a healthy, stable, and secure South Africa.

.....

... What I said was that we see two fundamental principles as essential—the elimination of discrimination, and we think *apartheid* is discriminatory, and full political participation by all of its citizens on an equal basis. These are essential to the transformation that would be the prerequisite to a stable South Africa and to the best possible relations with this country.

We also talked about steps, but not in detail, because we did not want to get into the position of prescribing what particular steps they should be taking. We said any progress would be helpful. For example, I said if the pass laws were repealed so that the citizens of South Africa could travel in and around South Africa as they chose, that would be helpful. We mentioned the retaining of political dissidents—Mrs. Winnie Mandela—and the intimidation of political dissidents as an example. I did not get into a specific list of particular laws and schools, the set-aside of certain jobs—I forget the exact name—that can only be held by certain people of a certain race. There is a long list that we could get into, but I did not want to do that because I wanted to get the emphasis on the principles, the long-term objectives that we see crucial to fundamental reform in South Africa.¹

Prime Minister Vorster is reported to have said in a press conference in Vienna immediately following that of Vice President Mondale that apartheid is not discriminatory, that South Africa is composed of several different nations, and that the full participation in national political life envisaged by the Vice President is irrelevant to South Africa's situation. Prime Minister Vorster drew a sharp distinction between American blacks, who he said had lost their African heritage and become completely Ameri-

¹ 76 DEPT. STATE BULL. 663–65 (1977). For Vice President Mondale's views concerning Southern Rhodesia and Namibia, see *supra* p. 756.

can, and South Africa's blacks, whom he described as embodying a culture and identity entirely different from that of the white community.²

Freedom of Information: Helsinki Principles

During the week of June 11 to June 17, 1977, *Los Angeles Times* correspondent Robert C. Toth was detained and questioned in Moscow by Soviet authorities concerning his alleged collection of secret information. During these interrogations of approximately three hours each on June 11, 13, and 14 and of six hours on June 15, protests were lodged by the White House, the Department of State, and the U.S. Senate. On June 17 he was informed that he could depart. Upon his release Mr. Toth indicated that a primary purpose of the interrogations was to investigate the activities of a Soviet citizen named Anatoly Shcharansky.

Prior to June 1977, Mr. Shcharansky, a spokesman for the Jewish emigration movement who had been refused permission to emigrate, phoned Mr. Toth to inquire if Mr. Toth wished to meet with a parapsychologist. This inquiry eventually led to three meetings with Mr. Valeriy Georgiyevich Petukhov, who delivered an allegedly secret article to Mr. Toth on parapsychology on June 11, 1977, when both Mr. Toth and Mr. Petukhov were arrested.

On or about June 1, 1977, Mr. Shcharansky had been reported in Moscow as having been charged with treason. On June 2, 1977, Mr. John H. Trattner, Director of the Office of Press Relations of the Department of State, made the following statement, in relevant part, concerning Mr. Shcharansky:

... [W]e have ... seen those stories and reports and are deeply concerned at what is reported ... to be happening.

... We have raised our concern with the Soviets ... through diplomatic channels.¹

On June 13, President Carter responded during a press conference to a question concerning the request by Mrs. Shcharansky for a personal interview while she was visiting in the United States:

I don't have any plans to meet Mrs. Shcharansky. But I have inquired deeply within the State Department and within the CIA as to whether or not Mr. Shcharansky has ever had any known relationship, in a subversive way or otherwise, with the CIA. The answer is no. We've double-checked this and I have been hesitant to make that public announcement, but now I'm completely convinced that contrary to the allegations that have been reported in the press ... Mr. Shcharansky has never had any sort of relationship, to our knowledge, with the CIA.²

On June 13, 1977, Hodding Carter III, Assistant Secretary of State for Public Affairs, responded to a question concerning Mr. Toth as follows:

² DEPT. OF STATE, 21 CURRENT FOREIGN RELATIONS, item 12 (May 25, 1977).

¹ Dept. of State News Briefing, DPC 100, June 2, 1977.

² 13 WEEKLY COMP. OF PRES. DOC. 880 (June 20, 1977).

We are protesting the detention [of Mr. Toth] to the Soviet Government.

... [W]e do deplore this action by the Soviet authorities.

In recent months the Soviet Government has repeatedly made false charges in the Soviet press that various American correspondents have been involved in subversive activities. We see the detention of Toth on Saturday as a continuation of this campaign to discredit and harass American correspondents and inhibit their contacts with Soviet citizens.³

On June 14, 1977, Mr. Toth was called to the U.S. Embassy where he as presented a note which the American Embassy had received from the Soviet Ministry of Foreign Affairs:

The Ministry of Foreign Affairs is authorized to state the following to the American embassy:

Competent organs have at their disposal information that the correspondent of the newspaper Los Angeles Times accredited to the Soviet Union, the American citizen Robert Charles Toth, during a specific period of time has been engaged in activities incompatible with the status of a foreign journalist accredited to the U.S.S.R., that is, with the collection of secret information of a political and military character.

On the 11th of June of this year Robert Charles Toth was apprehended at the moment of meeting with a Soviet citizen, Petukhov, Valeiry Georgiyevich, which took place under suspicious circumstances. When apprehended the American journalist was found to have materials given to him by Petukhov containing secret data. The Ministry of Foreign Affairs states its protest in connection with the impermissible activity of the American correspondent Robert Toth consisting of the collection of information of a secret character, and expects that the American side will take necessary measures for the prevention in the future of similar actions on the part of American correspondents accredited to the Soviet Union.

At the same time the Ministry of Foreign Affairs informs the American embassy in Moscow that in conformity with established procedure, Toth will be summoned for interrogation by the investigatory organs, in connection with which his departure from Moscow until the end of the investigation is not desired.⁴

On June 14, 1977, White House Press Secretary Jody Powell in response to a question commented on the question of Mr. Toth:

We have . . . formally protested this through the United States Embassy. The President is aware of it. He is quite concerned about it.

.....

I think the protest makes our feelings clear, and I can give you verbatim from that statement in which we say, "This act introduced a new and even more disturbing element into what seems to be a persistent effort by Soviet authorities to harass and intimidate American correspondents in the exercise of their profession. Such actions

³ Dept. of State News Briefing, DPC 107, June 13, 1977.

⁴ Washington Post, June 19, 1977, at 21.

cannot be considered in the best interests of normal U.S.-U.S.S.R. relations. Their impact on public opinion in the United States will clearly not be favorable to the Soviet Union."

I might add we also state that, "Furthermore, the Embassy considers the action against Mr. Toth to be inconsistent with commitments undertaken by the Soviet Government, through its signature, to the Final Act of the Conference on Security and Cooperation in Europe, which calls for participating states to increase opportunities for journalists to communicate directly with their sources and reaffirm that legitimate pursuit of their professional activity will not penalize journalists."⁵

At the Department of State news briefing also given on June 14, Mr. Trattner responded to a question as to whether Mr. Toth was permitted to have a consular officer with him while he was being questioned:

A consular officer did accompany Mr. Toth to a meeting today with the Soviet authorities, and it was requested by us that this consular officer be allowed to be present for the interrogation, but that request was denied by the Soviet authorities.⁶

On June 15, 1977, Mr. Toth was told that an American consul had not been permitted to be present during the questions because he was being "interrogated as a witness, not [as] an accused person."

On June 15, 1977, the U.S. Senate agreed to Senate Resolution 194 expressing concern about the Soviet detention and interrogation of Mr. Toth. The text of this resolution, which was introduced by Senator Claiborne Pell, follows:

Whereas the Soviet Union recently detained Robert C. Toth, an accredited United States reporter completing a three-year assignment in Moscow;

Whereas the Soviet Union has rejected an official United States protest and has refused Mr. Toth permission to leave the Soviet Union; and

Whereas both of these actions are a gross violation of the Helsinki Final Act which states clearly that "the participating states reaffirm that the legitimate pursuit of their professional activity will neither

⁵ White House News Conference No. 99, June 14, 1977.

⁶ Dept. of State News Briefing, DPC 108, June 14, 1977. The rights of consular officers are covered by Article 12 of the Consular Convention and Protocol between the United States and the Soviet Union which entered into force on July 13, 1968. 19 UST 5018, TIAS No. 6503, 655 UNTS 213. The article provides that:

1. A consular officer shall have the right within his district to meet with, communicate with, assist, and advise any national of the sending state and, where necessary, arrange for legal assistance for him. The receiving state shall in no way restrict the access of nationals of the sending state to its consular establishments.

2. The appropriate authorities of the receiving state shall immediately inform a consular officer of the sending state about the arrest or detention in other form of a national of the sending state.

3. A consular officer of the sending state shall have the right without delay to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody or is serving a sentence of imprisonment. The rights referred to in this paragraph shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must not nullify these rights.

render journalists liable to expulsion nor otherwise penalize them”:

Now, therefore, be it

Resolved, that it is the sense of the Senate that:

(1) The Government of the United States should continue to press for a complete accounting from the Soviet Government of the circumstances which precipitated the detention of Robert C. Toth; and

(2) Every appropriate means should be taken to obtain the safe return of Mr. Toth to the United States; and

(3) The Secretary of the Senate is hereby directed to provide a copy of this resolution to the President for transmittal to appropriate officials of the Soviet Union.⁷

On June 17, 1977, Mr. Trattner responded to a question as to what other action the Department of State was taking in the Toth matter:

... [T]here was another protest made by our Embassy in Moscow this morning.

.....

... We wanted to re-express our concern at the actions of the Soviet authorities and to reaffirm our belief that Bob Toth was acting in no way incompatibly with his status as a journalist working in the Soviet Union and that the Soviet actions were inconsistent with the Helsinki objectives.⁸

EXECUTIVE AGREEMENTS

(U.S. *Digest*, Ch. 5, §5)

Procedures

On June 15, 1977, President Carter signed into law the appropriation authorization act of the Department of State (P.L. 95-45), which, *inter alia*, contains a provision requiring any U.S. department or agency which enters into an international agreement to transmit a copy of the text of the agreement to the Department of State within twenty days after such agreement has been signed. The provision is an addition to the Case-Zablocki Act,¹ which requires that any international agreement other than a treaty be transmitted to the Congress as soon as practicable but in no event later than sixty days after such agreement has entered into force. The Case-Zablocki Act, as thus amended, reads as follows:

The Secretary of State shall transmit to the Congress the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on

⁷ 123 CONG. REC. S9884 (daily ed. June 15, 1977).

⁸ Dept. of State News Briefing, DPC 111, June 17, 1977.

¹ The Case-Zablocki Act was signed into law by President Nixon on Aug. 22, 1972 (Pub. L. No. 92-403).

International Relations of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President. *Any Department or agency of the United States Government which enters into any international agreement on behalf of the United States shall transmit to the Department of State the text of such agreement not later than twenty days after such agreement has been signed.*²

INTERNATIONAL ACTS NOT CONSTITUTING AGREEMENTS

(U.S. *Digest*, Ch. 5, §6)

On May 19, 1977, the Department of State released the text of a message dated February 1, 1973, from former President Richard M. Nixon to the Prime Minister of the then Democratic (now Socialist) Republic of Vietnam, Pham Van Dong. The message suggested, *inter alia*, that the U.S. contribution to postwar reconstruction in North Vietnam would be in the range of \$3.25 billion, although this estimate would be subject to revision and discussion by representatives of the United States and the Democratic Republic of Vietnam.

In releasing the text of the message, the Department announced that:

... The existence and substance of this document have already been made public, including public references by the recipient. Its author has indicated no objection to its release. In light of all present circumstances, we have determined that the message is no longer deemed sensitive, and it has been declassified.¹

The text of former President Nixon's message follows:

The President wishes to inform the Democratic Republic of Vietnam of the principles which will govern United States participation in the postwar reconstruction of North Vietnam. As indicated in Article 21 of The Agreement on Ending the War and Restoring Peace in Vietnam signed in Paris on January 27, 1973, the United States undertakes this participation in accordance with its traditional policies. These principles are as follows:

1) The Government of the United States of America will contribute to postwar reconstruction in North Vietnam without any political conditions.

2) Preliminary United States studies indicate that the appropriate programs for the United States contribution to postwar reconstruction will fall in the range of \$3.25 billion of grant aid over five years. Other forms of aid will be agreed upon between the two parties. This estimate is subject to revision and to detailed discussion between the Government of the United States and the Government of the Democratic Republic of Vietnam.

3) The United States will propose to the Democratic Republic of Vietnam the establishment of a United States-North Vietnamese Joint Economic Commission within 30 days from the date of this message.

² 1 U.S.C. §112(b)(1977). Italics indicate changes in the Act.

¹ 76 DEPT. STATE BULL. 674 (1977).

4) The function of this Commission will be to develop programs for the United States contribution to reconstruction of North Vietnam. This United States contribution will be based upon such factors as:

- (a) The needs of North Vietnam arising from the dislocation of war;
- (b) The requirements for postwar reconstruction in the agricultural and industrial sectors of North Vietnam's economy.

5) The Joint Economic Commission will have an equal number of representatives from each side. It will agree upon a mechanism to administer the program which will constitute the United States contribution to the reconstruction of North Vietnam. The Commission will attempt to complete this agreement within 60 days after its establishment.

6) The two members of the Commission will function on the principle of respect for each other's sovereignty, non-interference in each other's internal affairs, equality and mutual benefit. The offices of the Commission will be located at a place to be agreed upon by the United States and the Democratic Republic of Vietnam.

7) The United States considers that the implementation of the foregoing principles will promote economic, trade and other relations between the United States of America and the Democratic Republic of Vietnam and will contribute to insuring a stable and lasting peace in Indochina. These principles accord with the spirit of Chapter VIII of The Agreement on Ending the War and Restoring Peace in Vietnam which was signed in Paris on January 27, 1973.

UNDERSTANDING REGARDING ECONOMIC RECONSTRUCTION PROGRAM

It is understood that the recommendations of the Joint Economic Commission mentioned in the President's note to the Prime Minister will be implemented by each member in accordance with its own constitutional provisions.

NOTE REGARDING OTHER FORMS OF AID

In regard to other forms of aid, United States studies indicate that the appropriate programs could fall in the range of 1 to 1.5 billion dollars depending on food and other commodity needs of the Democratic Republic of Vietnam.²

STATE TERRITORY AND TERRITORIAL JURISDICTION

(U.S. *Digest*, Ch. 6, §1)

Transfer of Territory with Mexico

In a ceremony in the Department of State in Washington, D.C., Secretary of State Vance and Foreign Secretary Santiago Roel signed on May 26, 1977, an Act approving Minute 257 of the International Boundary and Water Commission¹ and thus confirmed that the relocations of the channel of the Rio Grande stipulated in paragraphs A, B, and C of Article I of the U.S.-Mexican Boundary Treaty of November 23, 1970² have been

² *Id.* 674-75.

¹ Dept. State Press Release No. 232, May 26, 1977.

² 23 UST 371, TIAS No. 7313, entered into force April 18, 1972.

completed. By virtue of this approval, jurisdiction over some 2,340 acres was transferred between the two countries and for the first time, since soon after the U.S.-Mexico Boundary Survey of 1853, the Rio Grande marks the undisputed international boundary at all points on its entire international reach from El Paso, Texas, to the Gulf of Mexico.

BILATERAL AGREEMENTS

(U.S. *Digest*, Ch. 8, §2)

U.S.-United Kingdom Air Services Agreement

The United States and the United Kingdom announced on June 22, 1977, the initialing in London of a new air services agreement to replace their existing bilateral agreement, commonly known as the Bermuda Agreement,¹ which expired at midnight on June 21, 1977. The new agreement, which will be reviewed by both sides and signed in Bermuda, will govern air services on North Atlantic, Pacific, Bermuda, and Caribbean routes for airlines of both countries. Under the new accord those airlines will have significant new route opportunities and operating flexibility. Mechanisms have been established for the review of rates and, in certain situations, of airline capacity as well, in order to promote more efficient and economical service for the public. For the first time, scheduled and charter air services are linked in a major bilateral agreement. Pending signature of the new agreement, air services between the two countries will continue as under the original Bermuda Agreement.

U.S. Special Ambassador Alan S. Boyd, head of the U.S. delegation, indicated that under the new agreement "[b]asic decisions concerning the provision of air services will continue to be made by the airlines, subject to governmental approval of rates and review of capacity that is deemed to be excessive." U.S. officials said that the new agreement represented an extension of the liberal principles of the original Bermuda Agreement and reflected a new emphasis on low-cost travel.

For the first time in a major air services bilateral agreement, charter air services are included together with scheduled services, although certain details remain to be worked out at a future date. In the interim both sides have agreed to incorporate the existing understanding on charter services in the basic agreement and apply certain provisions of the basic agreement to charters. In addition, during the last phase of the negotiations President Carter approved an innovative low-cost scheduled service proposed by Laker Airways, a British concern. The Laker plan provides low-cost, no-frill, no-reservation service between New York and London. U.S. carriers are expected to offer competitive proposals shortly.

Each country will have the right to designate two flag carriers to conduct services on two North Atlantic routes.

On North Atlantic routes the United States and United Kingdom will each be permitted to designate 2 airlines to operate the New York-London and the Los Angeles-London routes.

¹ 60 Stat. 1499, TIAS No. 1507, 3 UNTS 253, entered into force Feb. 11, 1946.

Airlines of both countries obtain operating rights from four new United States cities to London. In the first three years of the agreement, United States airlines will be authorized to serve Atlanta and Dallas/Ft. Worth nonstop to London; a British airline will be authorized to serve Houston. After this three-year period, airlines of both nations will be authorized to operate these routes, and the United States will be free to select a new gateway point for nonstop air services to London. British competition to the present United States flag service from Seattle to London will be permitted in the new agreement. In addition the United States receives the rights to fly between Anchorage and London, a route that British Airways today operates en route to Tokyo. The present requirement that London-San Francisco flights by a United Kingdom airline operate via New York will be dropped. As a result, it can be anticipated that British Airways will soon inaugurate London-San Francisco nonstop service.

In the Pacific the United States obtained new operating rights to Singapore. A United Kingdom airline will receive additional rights between Hong Kong and the United States west coast via Japan.

A special consultative process was formulated to prevent the unnecessary operation of empty seats on North Atlantic routes. This process may be invoked by either country in exceptional cases if an airline appears to be operating too many flights. The procedures do not give either government a veto over individual airline flights, but do meet United Kingdom concerns that increases in flights be reviewed by them if they appear excessive.

To protect consumers and assure that services are economically viable, new procedures for reviewing the prices charged by airlines of the two countries were agreed upon. In addition, a special working group will be set up to make recommendations on pricing policy to the two governments.²

CONDITIONS AND PROCEDURAL ASPECTS OF ASSERTION OF
CLAIM OF STATE RESPONSIBILITY

(U.S. *Digest*, Ch. 9, §1)

Claims against the German Democratic Republic

Wayland D. McClellan, General Counsel of the U.S. Foreign Claims Settlement Commission, signed on May 11, 1977, a notice announcing a program for claims against the German Democratic Republic. The notice indicated that the Commission would receive claims against the German Democratic Republic as authorized by law from May 16, 1977, until May 16, 1978. On the same day, Mr. McClellan signed a notice of a rule of the Foreign Claims Settlement Commission prohibiting the total remuneration for attorney fees from exceeding ten percent of the total amount paid on account of such claims.

The text of the notice of program follows:

NOTICE OF TIME FOR FILING

Notice is hereby given that pursuant to section 600, Title VI of the International Claims Settlement Act of 1949, as amended, the Foreign

² Dept. State Press Release No. 299, June 22, 1977.

Claims Settlement Commission of the United States will receive at its principal office located at 1111 20th Street, N.W., Washington, D.C. 20579, during the period beginning on the publication of this notice, and ending May 16, 1978, claims against the German Democratic Republic, as authorized by Title VI of the International Claims Settlement Act of 1949, as amended by Pub. L. 94-542, approved October 18, 1976 (90 Stat. 2509), and in accordance with the Regulations of the Commission made with respect thereto.

Title VI of the International Claims Settlement Act, as amended, provides for the determination of the validity and amounts of outstanding claims against the German Democratic Republic which arose out of the nationalization, expropriation, or other taking of (or special measures directed against) property interests of nationals of the United States, whether such losses occurred in the German Democratic Republic or East Berlin.

Details concerning the filing and claim applications may be obtained by contacting the Office of the General Counsel, Foreign Claims Settlement Commission, Washington, D.C. 20579, 202/653-6166.¹

The new regulation concerning attorney fees provides that:

(c) The total remuneration on account of services rendered or to be rendered to or on behalf of any claimant in connection with any claim falling within Title I, Title IV, or Title VI of the International Claims Settlement Act shall not exceed ten per centum of the total amount paid on account of such claim.²

INTERNATIONAL TRADE

(U.S. *Digest*, Ch. 10, §2)

Import Controls

On June 24, 1977, President Carter issued Proclamation 4511¹ which directed that the orderly marketing agreement entered into on May 20, 1977, between the Government of the United States of America and the Government of Japan with respect to the trade in certain articles of color television receivers should be implemented. The agreement,² which was signed by Robert S. Strauss, the U.S. Special Representative for Trade Negotiations, and Minoru Masuda, Japan's Vice Trade Minister, limits the number of Japanese color television receivers shipped to the U.S. market for three years, from July 1, 1977, to June 30, 1980. Earlier, on May 20, 1977, President Carter explained his decision in a congressional report to Thomas P. O'Neill, Jr., Speaker of the House of Representatives, and to Walter F. Mondale, President of the Senate, in the following terms:

IMPORT RELIEF FOR COLOR TELEVISION INDUSTRY

As required by Section 203(b)(1) of the Trade Act of 1974, I am transmitting this report to the Congress setting forth my determination to provide import relief to the United States color television receiver

¹ 42 Fed. Reg. 24770 (1977).

² Section 500.3, *id.* 24741.

¹ 13 WEEKLY COMP. OF PRES. DOC. 914-15 (June 27, 1977).

² See 16 ILM 631 (1977).

industry covered by the affirmative injury determination of March 22, 1977 of the United States International Trade Commission (USITC) under Section 201(d)(1) of the Trade Act. As my decision does not provide the import relief recommended by the Commission, I am setting forth the reasons why I have taken action different from [that] recommended by the USITC.

After considering the interests of both American consumers and producers, I have concluded that an orderly marketing agreement is the most effective remedy for the injury caused by increased imports to the color television receiver industry and its employees.

My decision was based upon my evaluation of the national economic interest. The remedy recommended by the USITC was the imposition of additional tariffs on color television receivers. The tariff increase recommended by the Commission was an additional 20 percentage points during the first year of import relief followed by 20, 15, 15 and 10 percentage point additional duties in the second through fifth years of the remedy. The existing duty is five percent.

Although a majority of the USITC Commissioners found injury to the domestic color television receiver industry, only three Commissioners found injury to the monochrome television industry. Since the Commission was evenly divided on the subject of injury to the monochrome television industry, I have determined, pursuant to Section 330(d) of the Tariff Act of 1930, to consider the vote of the three Commissioners determining no injury to the monochrome television receiver industry as the Commission determination. Consequently, no import relief is authorized under the Trade Act of 1974. I have, however, accepted the view of the three Commissioners determining serious injury to exist in the industry producing color television receiver subassemblies, certain ones of which I am including in my import relief determination.

To remedy the serious injury found by the USITC to exist in the domestic color television industry, I have determined to provide import relief in the form of an orderly marketing agreement with Japan, the major supplier to the U.S. market of color television receivers. Japan supplies over 80 percent of all imports into the United States of color television receivers. This agreement would be concluded solely with Japan. However, under the Trade Act, after negotiating an orderly marketing agreement, I have authority to take action against imports from other countries should those imports reach disruptive levels, interfering with the effectiveness of the orderly marketing agreement.

In determining not to take the advice of the USITC on the remedy for important relief in this case, I took account of several important considerations affecting the national economic interest, including the following:

First, by choosing to negotiate an orderly marketing agreement, it can be expected that increased production and employment will result in the domestic color television industry by both American companies and the U.S. subsidiaries of foreign companies. Expected higher sales and profits should encourage American companies to expand production here and to invest in the latest available machinery. The orderly marketing agreement will also encourage decisions to move foreign production into the United States or to expand existing

production facilities here, thus improving the prospects for increased domestic employment in the domestic color television industry beyond the timeframe of temporary relief under the escape clause.

In addition, since the reason for giving import relief is to assist the domestic industry in becoming more competitive with imports, it is important that the remedy achieve the maximum benefit for domestic producers or workers while having the minimum impact on consumers. Consumer costs for an across-the-board tariff increase are unacceptable at a time when covering the rate of inflation is essential. In the particular circumstances of the color television industry, this purpose is better achieved with an orderly marketing agreement than with tariffs.

A further problem is that nothing in the USITC remedy would have prevented circumvention of relief by minor design changes in the television receivers. This problem is remedied in the agreement.

Another important consideration was the possible compensatory import concessions that would have to be made by the United States to affected exporting countries or the retaliation by those countries against U.S. exports. Such actions would have cost American jobs and could have damaged U.S. exports by exposing our industrial and agricultural trade to increased barriers in important overseas markets.

In addition, the higher tariff recommended by the USITC would have been applied across-the-board on all countries and would have affected countries not responsible for the rapid rise in imports.

An orderly marketing agreement with Japan will considerably moderate the significantly increased exports from Japan which occurred in 1976. Such an agreement will reduce exports to the United States in the first agreement year to a level at least 40 percent below the 1976 level of exports.³

According to the Office of the Special Representative for Trade Negotiations,⁴ U.S. imports of color televisions from Japan increased from 1.0 million units in 1975 to 2.7 million in 1976. An additional several hundred thousand Japanese units entered the U.S. market in varying stages of completion and assembly, including so-called "kits" and other substantially assembled but not complete sets. Together, these shipments comprised the more than 80 percent of all current U.S. color television imports referred to by President Carter.

Under the U.S.-Japanese orderly marketing agreement, limits of 1.56 million units per year are placed on "complete" but not necessarily fully assembled receivers, and on 0.19 million incomplete receivers per year. These limits, which total 1.75 million units, will extend over the three years of the agreement. The orderly marketing agreement thus provides Japan with access to the U.S. color television market for these three years at a level consonant with its recent historic share, but approximately 40 percent below the 1976 high rate, which had been continuing into 1977.

³ 13 WEEKLY COMP. OF PRES. DOC. 762-63 (May 23, 1977).

⁴ Press Release No. 249, May 20, 1977.

Commodities Agreements: Sugar

On May 4, 1977, President Carter announced that the Secretary of Agriculture should institute, pending the successful negotiation and implementation of an International Sugar Agreement, an income support program for U.S. sugar producers offering supplemental payments whenever the market price falls beneath 13.5 cents a pound. At the same time, the President determined that the import quotas recommended on March 17, 1977, by the U.S. International Trade Commission would not be in the national economic interest.

The U.S. International Trade Commission, responding to a request of the U.S. Senate Finance Committee, found in its investigation of the American sugar industry that sugar imports were a substantial cause of a threat of serious injury to the domestic industry and recommended that a five-year import quota of 4.275 million short tons, raw value, for sugar imports should be allocated among supplying countries. The American Farm Bureau Federation also submitted a petition to the U.S. Special Representative for Trade Negotiations requesting that sugar be withdrawn from the list of products which are eligible for the Generalized System of Preferences (GSP) under the Trade Act of 1974. An Interagency Trade Policy Staff Committee reviewed these recommendations on the basis of national economic criteria spelled out in the Trade Act of 1974.

In his decision favoring an income support program and opposing import quotas, the President concurred with the determination of the Interagency Trade Policy Staff Committee that sugar should continue to receive duty-free treatment from eligible developing countries under the General System of Preferences. The Interagency Trade Policy Staff Committee found that imports of sugar under GSP account for only 17 percent of total sugar imports and do not significantly affect the U.S. price level.

President Carter's report to the Congress, which was submitted in identical letters to Thomas P. O'Neill, Jr., Speaker of the House of Representatives, and to Walter F. Mondale, President of the Senate, follows:

IMPORT RELIEF ACTION**SUGAR**

In accordance with Section 203(b)(2) of the Trade Act of 1974, I am transmitting this report to the Congress setting forth the actions I will take with respect to sugar imports covered by the affirmative finding on March 17, 1977, of the United States International Trade Commission (USITC) under Section 202(d)(1) of the Trade Act of 1974.

I have determined that import relief for the sugar industry is not in the national economic interest. Import relief, achieved either through quotas or tariff increases, would have an inflationary impact on the economy, raising prices to consumers without the promise of offsetting price stabilization benefits. It would be of questionable benefit to the domestic sugar industry, because it would encourage increased market penetration by substitute sweeteners, particularly

high-fructose corn syrup, which can be produced at a lower cost than most U.S. sugar.

In addition, the U.S. has entered into negotiations for an International Sugar Agreement (ISA) which, if successful, would provide some long-term assurance of greater stability in world prices. Imposition of import relief now would likely jeopardize the success of these negotiations. Finally, imposition of import relief would adversely affect the export earnings of a number of developing countries which depend on sugar exports for their economic growth and prosperity.

However, in recognition of the problems facing much of the U.S. sugar industry due to low sugar prices, I am requesting the Secretary of Agriculture to institute an income support program, for sugar producers, effective with the 1977 crop, offering supplemental payments of up to two cents a pound whenever the market price falls beneath 13.5 cents per pound. Such a program will help cover the costs of production of many U.S. sugar producers, pending the successful negotiation and implementation of an ISA. The United States has made a strong commitment to the negotiation of an ISA which, if successful, will provide some long-term assurance of greater stability of world sugar prices and supplies. The successful implementation of an ISA would also make further consideration of unilateral measures unnecessary.

Finally, I have asked the Special Trade Representative to continue to follow closely the sugar import situation and in consultation with the Secretary of Agriculture, to advise me with respect to any need for consideration of further action.¹

ECONOMIC SANCTIONS (U.S. *Digest*, Ch. 10, §12)

Foreign Boycotts

On June 22, 1977, President Carter signed into law the 1977 amendments¹ to the Export Administration Act of 1969 as amended. In his remarks at the signing ceremony, the President spoke of the need to "keep foreign boycott practices from intruding directly into American commerce."

For many months I've spoken strongly on the need for legislation to outlaw secondary and tertiary boycotts and discrimination against American businessmen on religious or national grounds. During the campaign I called this a profound moral issue from which we should not shrink.

My concern about foreign boycotts stemmed, of course, from our special relationship with Israel, as well as from the economic, military and security needs of both our countries. But the issue also goes to the very heart of free trade among all nations.

.....

The new law does not threaten or question the sovereign right of any nation to regulate its own commerce with other countries, nor is

¹ 13 WEEKLY COMP. OF PRES. DOC. 658 (May 9, 1977).

² Pub. L. No. 95-52.

it directed toward any particular country. The bill seeks instead to end the divisive effects on American life of foreign boycotts aimed at Jewish members of our society. If we allow such a precedent to become established, we open the door to similar action against any ethnic, religious, or racial group in America.²

The 1977 amendments to the Export Administration Act have two titles. The first improves and extends the Export Administration Act of 1969 as amended; the second, of which the President spoke, deals with foreign boycotts.³

ARMS CONTROL AND DISARMAMENT
(U.S. *Digest*, Ch. 14, §7)

U. S. Nuclear Power Policy

On April 7, 1977, President Carter outlined U.S. efforts to control the further proliferation of nuclear explosive capability. During his prepared remarks, President Carter compared the position of the United States with that of other countries concerning the need to rely on atomic power, emphasized U.S. determination to continue the embargo on the export of equipment and technology for uranium enrichment and chemical re-processing purposes, and discussed current efforts to establish an international nuclear fuel cycle evaluation program:

There is no dilemma today more difficult to address than that connected with the use of atomic power. Many countries see atomic power as their only real opportunity to deal with the dwindling supplies of oil, the increasing price of oil, and the ultimate exhaustion of both oil and natural gas.

Our country is in a little better position. We have oil supplies of our own, and we have very large reserves of coal. But even coal has its limitations. So, we will ourselves continue to use atomic power as a share of our total energy production.

The benefits of nuclear power, particularly to some foreign countries that don't have oil and coal of their own, are very practical and critical. But a serious risk is involved in the handling of nuclear fuels—the risk that component parts of this power process will be turned to providing explosives or atomic weapons.

We took an important step in reducing this risk a number of years ago by the implementation of the nonproliferation treaty which has now been signed by approximately a hundred nations. But we must go further.

We have seen recently India evolve an explosive device derived from a peaceful nuclear powerplant, and we now feel that several other nations are on the verge of becoming nuclear explosive powers.

The United States is deeply concerned about the consequences of the uncontrolled spread of this nuclear weapon capability. We can't

² 13 WEEKLY COMP. OF PRES. DOC. 898 (June 27, 1977).

³ The full text of the amendments are reprinted in 16 ILM 909 (1977); for the text of Title II, see *Official Documents* section, *infra* p. 843.

arrest it immediately and unilaterally. We have no authority over other countries. But we believe that these risks would be vastly increased by the further spread of reprocessing capabilities of the spent nuclear fuel from which explosives can be derived.

Plutonium is especially poisonous, and, of course, enriched uranium, thorium and other chemicals or metals can be used as well.

We are now completing an extremely thorough review of our own nuclear power program. We have concluded that serious consequences can be derived from our own laxity in the handling of these materials and the spread of their use by other countries. And we believe that there is strong scientific and economic evidence that a time for a change has come.

Therefore, we will make a major change in the United States domestic nuclear energy policies and programs which I am announcing today.

We will make a concerted effort among all other countries to find better answers to the problems and risks of nuclear proliferation. And I would like to outline a few things now that we will do specifically.

First of all, we will defer indefinitely the commercial reprocessing and recycling of the plutonium produced in U.S. nuclear power programs.

From my own experience, we have concluded that a viable and adequate economic nuclear program can be maintained without such reprocessing and recycling of plutonium. The plant at Barnwell, South Carolina, for instance, will receive neither Federal encouragement nor funding from us for its completion as a reprocessing facility.

Second, we will restructure our own U.S. breeder program to give greater priority to alternative designs of the breeder other than plutonium, and to defer the date when breeder reactors would be put into commercial use.

We will continue research and development, try to shift away from plutonium, [and] defer dependence on the breeder reactor for commercial use.

Third, we will direct funding of U.S. nuclear research and development programs to accelerate our research into alternative nuclear fuel cycles which do not involve direct access to materials that can be used for nuclear weapons.

Fourth, we will increase the U.S. capacity to produce nuclear fuels, enriched uranium in particular, to provide adequate and timely supplies of nuclear fuels to countries that need them so that they will not be required or encouraged to reprocess their own materials.

Fifth, we will propose to the Congress the necessary legislative steps to permit us to sign these supply contracts and remove the pressure for the reprocessing of nuclear fuels by other countries that do not now have this capability.

Sixth, we will continue to embargo the export of either equipment or technology that could permit uranium enrichment and chemical reprocessing.

And seventh, we will continue discussions with supplying countries and recipient countries, as well, of a wide range of international approaches and frameworks that will permit all countries to achieve their own energy needs while at the same time reducing the spread of the capability for nuclear explosive development.

Among other things—and we have discussed this with 15 or 20 national leaders already—we will explore the establishment of an international nuclear fuel cycle evaluation program so that we can share with countries that have to reprocess nuclear fuel the responsibility for curtailing the ability for the development of explosives.

One other point that ought to be made in the international negotiation field is that we have to help provide some means for the storage of spent nuclear fuel materials which are highly explosive, highly radioactive in nature.

I have been working very closely with and personally with some of the foreign leaders who are quite deeply involved in the decisions that we make. We are not trying to impose our will on those nations like Japan and France and Britain and Germany which already have reprocessing plants in operation. They have a special need that we don't have in that their supplies of petroleum products are not available.

But we hope that they will join with us—and I believe that they will—in trying to have some worldwide understanding of the extreme threat of the further proliferation of nuclear explosive capability.¹

During the question-and-answer session with reporters following his prepared remarks, President Carter was asked whether he favored regional reprocessing centers and whether he would be prepared to cut off supplies of any kind of nuclear material to countries pursuing a nuclear option. He responded:

Well, I can't answer either one of those questions yet. I have had detailed discussions with Prime Minister Fukuda, with Chancellor Schmidt, and also with Prime Minister Callaghan, for instance, just in recent days about a joint approach to these kinds of problems.

Obviously, the smaller nations, the ones that now have established atomic powerplants, have to have someplace either to store their spent fuel or to have it reprocessed. And I think that we would very likely see a continuation of reprocessing capabilities within those nations that I have named and perhaps others.

We in our own country don't have this requirement. It's an option that we might have to explore many, many years in the future.

But I hope that by this unilateral action we can set a standard and that those countries that don't now have reprocessing capability will not acquire that capability in the future. Regional plants under tight international control obviously is one option that we would explore. No decision has been made about that.

If we felt that the provision of atomic fuel was being delivered to a nation that did not share with us our commitment to nonproliferation, we would not supply that fuel.²

¹ 13 WEEKLY COMP. OF PRES. DOC. 502-04 (April 11, 1977).

² *Id.*

In reply to another question, President Carter indicated that Soviet authorities had responded favorably to a request by Secretary Vance to join in a nonproliferation effort. President Carter cautioned that a great deal of negotiation would be required if such an effort were to apply successfully to all nations.

MILITARY ASSISTANCE AND SALES

(U.S. *Digest*, Ch. 14, §9)

On May 19, 1977, President Carter issued a policy statement entitled "Conventional Arms Transfer Policy," which outlined some restrictions on U.S. arms transfers to other countries. Among the restraints are prohibitions against (1) the United States serving as a first supplier of advanced weapons systems into a region, (2) U.S. development of advanced weapons systems solely for export, and (3) coproduction agreements for significant weapons, equipment, and major components. The new policy also calls for a reduction in the sales of weapons in 1978 from the 1977 total, for the possibility of a stipulation as a condition of sale for certain weapons that the United States will not entertain requests for retransfers, and for new regulations requiring policy level authorization by the Department of State for actions by agents which might promote the sale of arms abroad. The statement reads as follows:

The virtually unrestrained spread of conventional weaponry threatens stability in every region of the world. Total arms sales in recent years have risen to over \$20 billion, and the United States accounts for more than one-half of this amount. Each year, the weapons transferred are not only more numerous but also more sophisticated and deadly. Because of the threat to world peace embodied in this spiralling arms traffic and because of the special responsibilities we bear as the largest arms seller, I believe that the United States must take steps to restrain its arms transfers.

Therefore, shortly after my inauguration, I directed a comprehensive review of U.S. conventional arms transfer policy, including all military, political, and economic factors. After reviewing the results of this study and discussing those results with Members of Congress and foreign leaders, I have concluded that the United States will henceforth view arms transfers as an exceptional foreign policy implement, to be used only in instances where it can be clearly demonstrated that the transfer contributes to our national security interests. We will continue to utilize arms transfers to promote our security and the security of our close friends. But in the future the burden of persuasion will be on those who favor a particular arms sale, rather than those who oppose it.

To implement a policy of arms restraint, I am establishing the following set of controls, applicable to all transfers except those to countries with which we have major defense treaties (NATO, Japan, Australia, and New Zealand). We will remain faithful to our treaty obligations and will honor our historic responsibilities to assure the security of the State of Israel. These controls will be binding *unless* extraordinary circumstances necessitate a Presidential exception, *or* where I determine that countries friendly to the United States must depend on advanced weaponry to offset quantitative and other disadvantages in order to maintain a regional balance.

1. The dollar volume (in constant FY 1976 dollars) of new commitments under the Foreign Military Sales and Military Assistance Programs for weapons and weapons-related items in FY 1978 will be reduced from the FY 1977 total. Transfers which can clearly be classified as services are not covered, nor are commercial sales, which the U.S. Government monitors through the issuance of export licenses. Commercial sales are already significantly restrained by existing legislation and executive branch policy.

2. The United States will not be the first supplier to introduce into a region newly developed, advanced weapons systems which would create a new or significantly higher combat capability. Also, any commitment for sale or coproduction of such weapons is prohibited until they are operationally deployed with U.S. forces, thus removing the incentive to promote foreign sales in an effort to lower unit costs for Defense Department procurement.

3. Development or significant modification of *advanced* weapons systems *solely for export* will not be permitted.

4. Coproduction agreements for significant weapons, equipment, and major components (beyond assembly of subcomponents and the fabrication of high-turnover spare parts) are prohibited. A limited class of items will be considered for coproduction arrangements, but with restrictions on third-country exports, since these arrangements are intended primarily for the coproducer's requirements.

5. In addition to existing requirements of the law, the United States, as a condition of sale for certain weapons, equipment, or major components, may stipulate that we will not entertain *any* requests for retransfers. By establishing at the outset that the United States will not entertain such requests, we can avoid unnecessary bilateral friction caused by later denials.

6. An amendment to the international traffic in arms regulations will be issued, requiring policy level authorization by the Department of State for actions by agents of United States or private manufacturers which might promote the sale of arms abroad. In addition, embassies and military representatives abroad will not promote the sale of arms and the Secretary of Defense will continue his review of Government procedures, particularly procurement regulations which may provide incentives for foreign sales.

In formulating security assistance programs consistent with these controls, we will continue our efforts to promote and advance respect for human rights in recipient countries. Also, we will assess the economic impact of arms transfers to those less-developed countries receiving U.S. economic assistance.

I am initiating this policy of restraint in the full understanding that actual reductions in the worldwide traffic in arms will require multilateral cooperation. Because we dominate the world market to such a degree, I believe that the United States can and should take the first step. However, in the immediate future the United States will meet with other arms suppliers, including the Soviet Union, to begin discussion of possible measures for multilateral action. In addition, we will do whatever we can to encourage regional agreements among purchasers to limit arms imports.¹

¹ 13 WEEKLY COMP. OF PRES. DOC. 756-57 (May 23, 1977).

JUDICIAL DECISIONS

Alona E. Evans

Act of state doctrine—antitrust suit—Libyan oil expropriation

HUNT v. MOBIL OIL CORP. 550 F.2d 68.*
U.S. Court of Appeals, 2d Cir., Jan. 12, 1977.

Plaintiffs brought an antitrust action against defendants (15 U.S.C. §§1, 8) and also sought damages for breach of contract. Damages under the antitrust complaint would amount to some \$125 million before trebling. Plaintiffs operated an oil concession at the Sarir Field in Libya in conjunction with the British Petroleum Co. (BP). Following the accession to power of Col. Mu'ammarr al-Qadhafi in 1969, the new government instituted a policy of increasing the government's share of oil profits, a situation which by the end of 1970 was influencing the policies of the Persian Gulf members of the Organization of Petroleum Exporting Countries. Seven of the defendants who constituted the major oil producing companies in Libya and the Persian Gulf area¹ (Seven) met in January 1971 for the purpose of formulating a common policy regarding these demands. As this action had antitrust implications, the Seven cleared the matter with the Department of Justice, which took the position that it would not pursue an antitrust action, provided that plaintiffs and other independent oil producers in Libya were included in the Seven's policymaking. Plaintiffs and the Seven then concluded the Libyan Producers Agreement of January 15, 1971, (Agreement), whereby any cutback in Libyan oil production would be shared proportionately by all and Persian Gulf oil would be supplied to meet any production deficiencies arising from a change in the Libyan situation. The terms of the Agreement and of subsequent modifications were reported to the Department of Justice.

After the nationalization of BP's share of the Sarir Field in December 1971, the Libyan Government ordered plaintiffs to market BP's share on behalf of the government. When plaintiffs refused, the government subjected them to various repressive measures, terminating in the nationalization of their concession in June 1973.

Plaintiffs' action arose from their contention that the Agreement constituted a combination and conspiracy in violation of the Sherman Act and the Wilson Tariff Act which prevented them from negotiating with the Libyan Government with the result that their concession was nationalized. Defendants moved to dismiss plaintiffs' three antitrust claims for want of

* Text reprinted at 16 ILM 803 (1977).

¹ The seven defendants were Mobil Oil Corp., Exxon Corp., Shell Petroleum Corp., Ltd., Texaco, Inc., Standard Oil Co. of California, The British Petroleum Co., Ltd., and Gulf Oil Corp. (footnote by Court; other footnotes by Court omitted).

subject-matter jurisdiction and failure to state a claim upon which relief could be granted (Fed.R.Civ.P. 12(b)(1)(6)). Plaintiffs' fourth claim was not germane to this appeal. The District Court granted defendants' motion to dismiss the third claim for treble damages on the ground that it was barred by the act of state doctrine in that plaintiffs would have had to prove that the actions of the Libyan Government were related to the Agreement (410 F.Supp. 10 (S.D.N.Y. 1976)). On appeal, the Court of Appeals affirmed this decision.

In the opinion of Circuit Judge Mulligan, there was no doubt that the Sherman Act applied to the third claim because the alleged conspiracy had been developed in the United States.² There was also no doubt that the act of state doctrine applied here because the expropriation of plaintiffs' property was clearly a sovereign act, which in this instance was founded upon political considerations, and hence could not be subjected to judicial scrutiny.

Plaintiffs argued that as Libya had not been named as defendant nor coconspirator in the complaint the Court would not be sitting in judgment on the state's acts in deciding the third claim. The Court pointed out, however, that "a private plaintiff who seeks damages in an antitrust action must allege and establish that his business or property was injured as a direct result of the Sherman Act violation."³ Here, plaintiffs were unable to show that Libya's action was connected with the alleged conspiracy.

Plaintiffs contended that, as they had not attacked the Libyan action directly as violative of international law or the Sherman Act, the act of state doctrine could not be invoked. Mulligan, C.J., observed, however, that the third claim would not be sustainable unless the trial court inquired into the Libyan expropriation. That inquiry would reveal the political motivation of the expropriation, a matter which the U.S. Government had also characterized as a political act in a note to the Libyan Government in 1973.⁴

Finally, plaintiffs argued that the act of state doctrine should "be re-defined so that it would solely be utilized where a determination of the legality of the foreign sovereign's action is the issue."⁵ The Court dismissed this argument by pointing out that "the issue of legality cannot be isolated from the issue of the motivation of the foreign sovereign."⁶ In the opinion of the Court, the present complaint did not come under the 'purely commercial exception' stated in *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682 (1976) (70 AJIL 828 (1976)). The act of state doctrine as stated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (58 AJIL 779 (1964)) "remains unblemished"⁷ after *Dunhill*.

² Citing *American Banana v. United Fruit Co.*, 213 U.S. 347 (1909) as distinguished in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

³ 550 F.2d 68, 76.

⁴ Citing A. ROVINE, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 1973, at 335.

⁵ 550 F.2d 68, 78.

⁶ *Id.*

⁷ *Id.* 79.

Circuit Judge Van Graafeiland, dissenting, took the position that plaintiffs' third claim should be adjudicated because the act of state doctrine, in his opinion, did not bar judicial inquiry into the acts of a foreign sovereign but only barred "judicial determination of the validity" of such acts.⁸

Aliens—permanent residents—eligibility for financial aid to education—citizenship requirement—the law of New York

NYQUIST v. MAUCLET, 97 S.Ct. 2120.
U.S. Supreme Court, June 13, 1977.

Plaintiffs, nationals of France and Canada, respectively, were admitted to permanent residence in the United States. The French plaintiff's application for financial aid for support of his graduate studies at the State University of New York at Buffalo was denied because he was unwilling to apply for U.S. citizenship. A scholarship which had been offered to the Canadian plaintiff at Brooklyn College had been withdrawn on the ground that he had refused to apply for U.S. citizenship. Plaintiffs challenged the constitutionality of Section 661(3) of the New York Education Law (McKinney's Supp. 1976), which required that an applicant for financial aid to education must be a U.S. citizen, a declarant alien, or an alien who intended to declare for U.S. citizenship. A three-judge District Court granted plaintiffs' motion for an injunction (*Mauclet v. Nyquist*, 406 F.Supp. 1233 (W.D.N.Y. 1976); 71 AJIL 148 (1977)). On appeal, the Supreme Court affirmed this judgment.

Mr. Justice Blackmun pointed out that the Supreme Court took a strict view of the use of alienage as the basis for classification by a state. Appellants' argument that Section 661(3) did not constitute classification by alienage because it authorized aid to declarant aliens or those willing to declare their intent to seek citizenship as well as to citizens lacked merit, in the Court's opinion, given the holding in *Graham v. Richardson*, 403 U.S. 365 (1971) regarding a state's attempt to limit welfare benefits to aliens on the basis of a residency requirement. Mr. Justice Blackmun said: "The important points are that §661(3) is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class."¹

The Court was not impressed by appellants' contention that Section 661(3) had the laudable effect of encouraging aliens to apply for citizenship. The Court observed that immigration and naturalization were outside the province of a state government. Mr. Justice Blackmun concluded, referring to *Sugarman v. Dougall*, 413 U.S. 634 (1973); 68 AJIL 335 (1974), that as resident aliens are taxpayers, they deserve to enjoy the benefits of public programs supported by taxes.

Mr. Chief Justice Burger, dissenting, together with Justices Powell, Stewart, and Rehnquist, distinguished the present case from earlier cases

⁸ *Id.* 80.

¹ 97 S.Ct. 2120, 2125 (footnotes by Court omitted).

concerning classification by alienage on the ground that the latter had interfered with the right of resident aliens to enter certain occupations or professions, whereas in the present case, the state was not barring aliens from acquiring higher education but only from obtaining public financial assistance for that purpose. The Chief Justice said: "Where a *fundamental* personal interest is not at stake—and higher education is hardly that—the State must be free to exercise its largesse in any reasonable manner."² Justices Rehnquist and Powell, dissenting, took the view that the New York classification was reasonable and that the state was acting within its powers in providing an incentive to aliens to acquire U.S. citizenship.

Aliens—plenary power of Congress to control admission—exclusion of natural father of illegitimate child

FIALLO v. BELL. 97 S.Ct. 1473.

U.S. Supreme Court, April 26, 1977.

Plaintiffs sought to enjoin the enforcement of Sections 101(b)(1)(D) and 101(b)(2) of the Immigration and Nationality Act of 1952 as amended (8 U.S.C. §§1101(b)(1)(D) and 1101 (b)(2)), which granted special preference to immigrants who were either the children or the parents of U.S. nationals or of aliens who had been admitted to permanent residence and which defined "child" in terms of the relation to the natural mother whether the child were legitimate or not. Plaintiffs contended that these provisions were discriminatory where the relation was between the natural father and an illegitimate child. A three-judge District Court, holding that, in view of Congress' plenary power over the admission of aliens, the statutory provisions at issue did not discriminate against plaintiffs, granted judgment for defendant and dismissed the complaint (*Fiallo v. Levi*, 406 F.Supp. 162 (S.D.N.Y. 1975)). On appeal, the Supreme Court affirmed this decision.

Mr. Justice Powell pointed out that a number of decisions of the Supreme Court, from 1889 to the present, maintained the principle that congressional control over aliens was much broader than congressional power over citizens. In the opinion of the Court, the family situation raised by complainants did not warrant "review [of] the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case."¹ The legislative history of the 1952 Act showed that it was amended in 1957 to comprehend the relation between the illegitimate child and the natural mother. Omission of the relation between the illegitimate child and the natural father was clearly an "intentional choice"² of Congress and one of the several distinctions made in the Act regarding the grant of preferential status to children. Mr. Justice Powell concluded that it was not "the judicial role in cases of this sort to probe and test the justifications for the legislative decision."³

² *Id.* 2128 (emphasis by Court).

¹ 97 S.Ct. 1473, 1479. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

² 97 S.Ct. 1473, 1480.

³ *Id.* 1482.

Mr. Justice Marshall dissenting, joined by Justices Brennan and White, took the position that the majority's view justified "discrimination among citizens, however invidious and irrational, . . . if it occurs in the context of the immigration laws."⁴

Aliens—refugees—burden of proof of prospective persecution in state of destination

HENRY V. IMMIGRATION AND NATURALIZATION SERVICE. 552 F.2d 130.
U.S. Court of Appeals, 5th Cir., May 13, 1977.

Petitioners, nationals of Haiti who had been found deportable on the ground that they were illegally in the United States, sought relief under 8 U.S.C. §1253(h) which authorizes the Attorney General "to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion. . . ." Their applications were denied by the Immigration Judge, whose decision was affirmed by the Board of Immigration Appeals. On petition for review, the Court of Appeals affirmed the Board's decision.

Circuit Judge Goldberg pointed out that a deportable alien who invoked Section 1253(h) had the burden of proving that he faced prospective persecution in the country of destination. Although petitioners asserted that the Haitian Government took repressive measures against its nationals returning from abroad, their views were supported only by their personal opinions; nor could they show that members of their families in Haiti had been adversely treated. The Court observed that petitioners' contention that they had been deprived of due process of law because the District Director of the Immigration and Naturalization Service had not notified the Department of State about their applications for political asylum must fail, as they had not raised this matter prior to the appellate proceeding.

Extradition—competency of evidence determined by law of requested state—1842 Webster-Ashburton Treaty

O'BRIEN V. ROZMAN. 554 F.2d 780.
U.S. Court of Appeals, 6th Cir., May 3, 1977.

Petitioner, a Canadian national, sought to bar his extradition to Canada on a murder charge, contending that hearsay evidence was offered in support of the extradition request and that the competency of such evidence must be determined by Canadian law. Extradition had been requested pursuant to Article X of the Webster-Ashburton Treaty of 1842 (8 Stat. 572, TS 119, 12 Bevans 82). The District Court denied his petition for habeas corpus relief. The Court of Appeals affirmed this decision.

In a per curiam opinion, the Court of Appeals pointed out that Article X of the Webster-Ashburton Treaty stated clearly that the sufficiency of evidence submitted in support of an extradition request was to be determined by the law of the requested state, here, the law of Michigan. Petitioner's

⁴ *Id.*

argument that according to 18 U.S.C. §3190, regarding the admissibility of evidence, Canadian law would govern any question about the evidence was found by the Court to be without merit because Section 3190 was concerned only with the authentication of documents and other material submitted as evidence and not with the substantive nature of that evidence.

Extradition—specialty

UNITED STATES v. ROSSI. 545 F.2d 814.
U.S. Court of Appeals, 2d Cir., Nov. 11, 1976.
Cert. denied, 97 S. Ct. 1178 (1977).

Defendant was convicted on a charge of conspiracy to traffic in narcotics between 1965 and February 15, 1973 in violation of the Narcotic Drugs Import and Export Act (§2(b)(d)(f), 41 Stat. 596 as amended). This charge was included in an indictment which had been handed down on February 15, 1973. He was extradited from Spain, however, pursuant to an indictment, handed down in 1972, which charged him with commission of the same offense between January 1969 and September 1973. These latter dates appeared in the Spanish extradition order. Defendant appealed the conviction on the ground that because of the difference in dates as stated in the two indictments his trial violated the principle of specialty. In a per curiam opinion, the Court of Appeals affirmed the judgement below.

The Court took the position, following *United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962); 56 AJIL 1107 (1962)), that the principle of specialty applied to the offense for which extradition was granted and did not reach a discrepancy in dates contained in the extradition order and the indictment.

International Boundary Commission, United States-Canada—whether agency of United States for purposes of suit

EDISON SAULT ELECTRIC CO. v. UNITED STATES. 552 F.2d 326.
U.S. Court of Claims, Mar. 23, 1977.

In an action against the United States for breach of contract, plaintiff sought to recover \$296,954.38 in damages. Plaintiff held a lease from the United States for the production of hydroelectric power at a plant at the Sault Ste. Marie rapids on the St. Mary's River, which is part of the boundary between the United States and Canada. Plaintiff contended that emergency action in 1973, taken by the International Joint Commission, United States-Canada,¹ (I.J.C.) and designed to lower the water level in Lake Superior by reducing the flow through Sault Ste. Marie, forced plaintiff to reduce the flow through its plant, leading to a power loss which plaintiff had to meet by purchasing power from another company in order to fulfill its energy commitments. It was argued on behalf of plaintiff that

¹ The Commission was established under the Treaty Relating to Boundary Waters and Questions Arising along the Boundary between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448, TS 548.

the United States was the appropriate defendant because the United States had requested the reduction in flow in the first place, all discussion of the matter had been between plaintiff and the U.S. Army Corps of Engineers, and because the I.J.C. had no jurisdiction over plaintiff. Defendant moved for summary judgment on the ground of sovereign immunity. The Court of Claims granted defendant's motion but did not rule on the defense of sovereign immunity.

Examining the history of the relationship between plaintiff's contractual commitment with the United States regarding the plant and the situation that had led to the emergency reduction of the flow of water through the plant, Senior Judge Cowen found that plaintiff could not recover against the U.S. Government because the emergency action had been taken in pursuance of a decision of the I.J.C. The Court said:

For the United States to be liable for acts of a third party, the third party must, at the least, be an "agency or instrumentality of the United States acting within the scope of its authority in entering into the disputed agreement and thereby binding defendant as a principal to it." *Rose Marie Porter v. United States* . . . 496 F.2d [583], at 587 [(Ct. Cl. 1974), *cert. denied*, 420 U.S. 1004 (1975)]. . . . The mere fact that the United States participates in the actions of the third party—in this case through its membership in the I.J.C.—does not establish an agency relationship where the third party is a sovereign body which may, at its option, act independently of the wishes of the United States.²

Similarly, the United States did not have an agency relationship here to the U.S. Army Corps of Engineers. In transmitting the orders of the I.J.C. to plaintiff, the Corps of Engineers had acted as agent of the International Lake Superior Board of Control, on which it was represented, which, in turn, was an agency of the I.J.C.

Plaintiff argued that the I.J.C. lacked jurisdiction over it because plaintiff's facilities antedated the establishment of the I.J.C. in 1909 and because, in an opinion issued in 1914, the I.J.C. had indicated that plaintiff's plant was "wholly within" the jurisdiction of the United States.³ In the opinion of the Court, these arguments lacked merit. On the one hand, plaintiff's plant had continuously used the waters in question since 1909 and would do so under a new lease until 2000. On the other hand, the I.J.C., in its 1914 opinion, clearly used the term "jurisdiction" to mean its own authority over the plant as well as to mean geographical location.

Finally, the fact that the reduction in the flow of water was based upon a report issued by the Corps of Engineers did not invest the United States with responsibility for the reduction. The I.J.C. had the discretion to act or not act upon the report. The Court observed that the I.J.C. had sovereign immunity unless it chose to waive that immunity, which had not been shown here (22 U.S.C. §288 (1970)).

² 552 F.2d 326, 333.

³ *Id.* 334.

International narcotics traffic—use of postal service—justification of warrantless search of international letter mail—border search

UNITED STATES V. RAMSEY. 97 S.Ct. 1972.

U.S. Supreme Court, June 6, 1977.

Defendants were convicted on charges of operating a business whereby heroin was supplied to customers in the District of Columbia by mail from Bangkok. Evidence against defendants consisted of the contents of six airmail envelopes which a customs officer had opened because of their bulk and which had been found to contain heroin. The six envelopes were resealed and delivered to defendants, who were then arrested for violation of the narcotics laws. Defendants moved to suppress the heroin on the ground that its existence had been originally disclosed by a warrantless search. The District Court denied this motion. The Court of Appeals for the District of Columbia reversed the convictions on the ground that the "border search exception to the warrant requirement" applicable to persons, baggage, and mailed packages did not apply to the routine opening of international letter mail, and . . . that the Constitution requires that 'before international letter mail is opened, a showing of probable cause be made to and a warrant secured from a neutral magistrate.'"¹ On appeal, the Supreme Court reversed the decision of the Court of Appeals.

Mr. Justice Rehnquist pointed out that the relevant postal law and regulations (19 U.S.C. §482, 19 C.F.R. §145.2, 39 C.F.R. §61.1) empowered customs officials to search incoming international mail which they had "reasonable cause to suspect . . . [contained] merchandise which was [being] imported contrary to law. . . ."² The Court observed that the standard of "reasonable cause" was less rigorous than that of "probable cause" under the Fourth Amendment. There was no doubt that the search of the envelopes came within the terms of the statute.

As to whether the search was unconstitutional, the Court pointed out that the constitutionality of border searches without warrant had long been upheld as a reasonable means of controlling the admission of persons and goods into the country. This exception to the Fourth Amendment extended to the admission of contraband by international letter mail.

Mr. Justice Powell, concurring, emphasized the point that the border search of incoming mail should not be construed so as to extend the limits fixed by the statute and regulations which prohibited the reading of any correspondence therein.

Mr. Justice Stevens dissenting, and joined by Justices Brennan and Marshall, said:

If the Government is allowed to exercise the power it claims, the door will be open to the wholesale, secret examination of all incoming international letter mail. No notice would be necessary either

¹ 97 S.Ct. 1972, 1976, quoting *United States v. Ramsey*, 538 F.2d 415, 421 (D.C. Cir. 1976). The Court of Appeals' holding was contrary to the views of the Courts of Appeals for the Second, Fourth, Fifth, Sixth, and Seventh Circuits (footnote by Court; other footnotes by Court omitted).

² 97 S.Ct. 1972, 1976.

before or after the search. Until Congress has made an unambiguous policy decision that such an unprecedented intrusion upon a vital method of personal communication is in the Nation's interest, this Court should not address the serious constitutional question it decides today.³

Jurisdiction—Puerto Rico—effect on laws of change from territory to commonwealth status

UNITED STATES V. VILLARIN GERENA. 533 F.2d 723.
U.S. Court of Appeals, 1st Cir., April 29, 1977.

Defendant, a member of the Puerto Rican Police Force, was convicted in a jury trial on charges of striking a private citizen and arresting him without probable cause (18 U.S.C. §242). He was sentenced to two years probation on condition that he resign from the police force. On appeal, he moved, *inter alia*, for dismissal of the indictment for want of jurisdiction, contending that Section 242 did not apply to Puerto Rico after it had acquired commonwealth status. The Court of Appeals affirmed the judgment below.

Observing that Puerto Rico had been a Spanish possession in 1866 and 1870 when the original statute, now Section 242, was enacted and then extended to U.S. territories, Circuit Judge Ingraham found no reason why Section 242 would not have applied to Puerto Rico when it did acquire territorial status. Moreover, there was nothing in the legislation concerning the change from territorial to commonwealth status to indicate that Section 242 would no longer apply to Puerto Rico. In view of the fact that the Supreme Court had held that Puerto Rico was bound by 28 U.S.C. §1343 (3) (civil jurisdiction of district courts respecting protection of civil rights) and that the District Court for Puerto Rico had held that 42 U.S.C. §1983 (civil suit for violation of civil rights) applied in the Commonwealth, the Court concluded that Section 242 which dealt with similar subject matter, but on the criminal side, was equally applicable to Puerto Rico.

Jurisdiction—nationality—territorial—reach of 1972 Marine Mammal Protection Act—The Bahamas

UNITED STATES V. MITCHELL. 553 F.2d 996.
U.S. Court of Appeals, 5th Cir., June 13, 1977.

Defendant, an American national, was convicted in a jury trial, *inter alia*, of capturing nine Atlantic Bottlenose Dolphins in the territorial waters of the Bahamas in violation of the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. §1361 *et seq.*, as implemented by 50 C.F.R. §216.11 (1974), which had established a moratorium on the taking of these animals. Defendant admitted taking the dolphins but contended that he had a permit from the Bahamian Government to do so and that he had had no intention of importing the animals into the United States. He appealed on the grounds that the statute could not be enforced against acts com-

³ *Id.* 1987.

mitted within the territorial waters of a foreign state. The Court of Appeals reversed the judgment below.

Circuit Judge Wisdom observed that there was ample precedent for the conclusion that Congress had the power to control the conduct of American nationals abroad.¹ The question here, however, was whether Congress had intended the MMPA to reach conduct by American nationals in a foreign state. The Court pointed out that Section 1383 of the MMP provided "that the Act is not intended to contravene the provisions of any existing international treaty, convention, or agreement, or any statute implementing the same, which may otherwise apply to the taking of marine mammals."²

The Court continued:

Furthermore, section 1378 establishes the United States approach to international protection of marine mammals by directing the Secretary of State to initiate negotiations for both bilateral and multilateral agreements on the subject. The basic purpose of the moratorium, prohibitions, and permit system therefore appears to be the protection of marine mammals only within the territory of the United States and on the high seas. Conservation in other states is left to diplomatic negotiations. Restricting the territorial scope of the Act would not "greatly curtail the scope and usefulness of the statute" nor frustrate its purpose. We cannot then infer from the nature of the MMPA that Congress intended to apply its restrictions to the territories of foreign sovereigns.³

Examining the legislative history of the statute, Circuit Judge Wisdom was unable to find "a clear expression of congressional intent for the application of the Act in foreign territories."⁴ Consequently, there was no legal basis for the prosecution of defendant under the Act.

Jurisdiction—letters rogatory—criminal investigation

IN RE LETTERS ROGATORY FROM THE TOKYO DISTRICT, TOKYO, JAPAN.
539 F.2d 1216.

U.S. Court of Appeals, 9th Cir., June 23, 1976.

Letters Rogatory were issued by the Tokyo District Court to the District Court for the Central District of California for the purpose of taking depositions from certain witnesses for use in a criminal investigation of the activities of the Lockheed Aircraft Corp. in Japan. Subpoenas *duces tecum* were directed to the witnesses, who then moved to quash the subpoenas on the grounds, *inter alia*, that the testimony was not going to be used by the Tokyo District Court but rather by the Tokyo District Public Prosecutor's Office for the purpose of carrying out the investigation and hence violated 28 U.S.C. §1782. The District Court ordered that testimony be taken under the Letters but granted witnesses' motion for a stay pend-

¹ Citing, e.g., *United States v. Lansky*, 496 F.2d 1063 (5th Cir. 1974), *rehearing denied en banc*, 502 F.2d 1168 (5th Cir. 1974); 69 AJIL 178 (1975).

² 553 F.2d 996, 1002-03.

³ *Id.*, quoting *United States v. Bowman*, 260 U.S. 94, 98 (1922) (other footnotes by Court omitted).

⁴ *Id.*

ing this appeal. The U.S. Attorney, acting as a commissioner with regard to the Letters, moved to terminate the stay as there was some urgency in the matter. The Court of Appeals granted this motion and vacated the stay.

In its Order, the Court pointed out that, according to 28 U.S.C. §1782, the District Court could honor Letters Rogatory at its discretion. The Court observed that Section 1782 had been interpreted as reaching criminal investigations. The use to which the Letters might be put in Japan, however, would not be open to examination here, as the witnesses were not under investigation nor were they defendants to any case in Japan.

Jurisdiction—serviceman in South Vietnam—service connected offense

STEVENS v. WARDEN, U. S. PENITENTIARY, LEAVENWORTH, KANSAS.
536 F.2d 1334.

U.S. Court of Appeals, 10th Cir., June 24, 1976.

Petitioner, a combat soldier in the U.S. Army stationed in South Vietnam, was convicted in 1969 by court-martial on charges of being absent without leave and of the unpremeditated murder of a military policeman (Arts. 86, 118, Uniform Code of Military Justice (UCMJ)). He was sentenced to 30 years' imprisonment. The conviction and sentence were affirmed by the U.S. Court of Military Appeals. Petitioner applied for a writ of habeas corpus, arguing that the United States did not have jurisdiction over him with respect to the murder charge, as this act had occurred off base and in the civilian community. The District Court denied the petition. On appeal, the Court of Appeals affirmed this decision.

The Court in a per curiam opinion pointed out that petitioner, as a combat soldier on active duty in Vietnam, was subject to the UCMJ. As to whether Vietnam had jurisdiction over the offense, the Court observed that "one who violates the law of two sovereigns is subject to prosecution by both and may not complain of or choose the manner in which each proceeds against him."¹ With regard to the question of whether petitioner should have been tried in a civilian court, the Court of Appeals, citing *O'Callahan v. Parker*, 395 U.S. 258 (1969), found that "the requisite service connection necessary for court-martial jurisdiction [was] . . . abundantly established under the facts of this case."²

Jurisdiction—death on high seas—foreign flag ship—Jones Act

ZORIANO SANCHEZ v. CARIBBEAN CARRIERS LTD. 552 F.2d 70.
U.S. Court of Appeals, 2d Cir., Mar. 30, 1977.

Representatives of 25 deceased seamen brought suit under general maritime law and the Jones Act (46 U.S.C. §688) for damages against the owners of the *M/V Caribe* which was presumed to have been lost at sea with all aboard. All plaintiffs were nationals of the Dominican Republic. At the time of its loss, the ship, which was owned by a Dominican corporation and was flying the Dominican flag, was en route from Colombia to

¹ 536 F.2d 1334, 1336.

² *Id.* 1337.

the Dominican Republic with a crew comprising nationals of both states. As it had not been shown that the ship, its owners, or the crew had had any point of contact with the United States, the District Court for Puerto Rico granted defendants' motion for dismissal for want of jurisdiction (Fed.R.Civ.P. 12(b)(2)) and with prejudice. The Court of Appeals for the First Circuit affirmed this decision per curiam but struck the words "with prejudice." In a second suit in the Southern District of New York, the same facts were found. The Court dismissed this suit for want of jurisdiction and for improper service on defendants (Fed.R.Civ.P. 12(b)(2)(5)). Plaintiffs' motion to reargue the case was denied by the District Court (S.D.N.Y.), as was their effort to have the dismissal order set aside on the ground that their suit could now be heard following the striking of "with prejudice" by the Court of Appeals for the First Circuit. Plaintiffs then appealed from the orders of dismissal. The Court of Appeals for the Second Circuit affirmed the decisions of the District Court (S.D.N.Y.).

The problem was whether plaintiffs had any cause of action which could be heard in the United States. Their effort to find a remedy under Liberian law which they said "empower[ed] the courts to consider the non-statutory General Maritime Law of the United States of America"¹ could not override the doctrine of *res judicata* here in the opinion of Circuit Judge Anderson; and foreign law could not be applied by a federal court in a case in which its jurisdiction was not established.

Plaintiffs contended that the fact that defendant Caribbean Carriers Ltd. included a U.S. national and a person having dual United States-Dominican nationality among its directors and that the ship's operations had been financed in part through sources in the United States established contacts with the United States for purposes of this suit. The Court found no merit in these arguments, pointing out that the Jones Act could not be extended to foreign seamen solely on the grounds of the mode of financing of the ship.²

Treaties—abrogation by war—abrogation by subsequent legislation— 1794 Jay Treaty—Indian rights

AKINS v. UNITED STATES. 551 F.2d 1222.

U.S. Court of Customs and Patent Appeals, Mar. 31, 1977.

Plaintiff, a U.S. national and a Penobscot Indian residing in the United States, protested the imposition of customs duties on a pair of hiking boots which he had bought in Canada for his own use. He contended that under Article III of the 1794 Treaty of Amity, Commerce and Navigation (Jay Treaty) (8 Stat. 116, TS 105, 12 Bevans 13) members of the Six Nations were exempted from the payment of customs duties on goods which they transported across the border for personal use. Defendant argued that Article III had been abrogated by the War of 1812. Both

¹ 552 F.2d 70, 72.

² The Court observed that this argument represented an effort to invoke *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970), *rehearing denied*, 400 U.S. 856 (1970); 64 AJIL 960 (1970).

parties moved for summary judgment. The Customs Court denied plaintiff's motion (407 F.Supp. 748 (1976); 71 AJIL 357 (1977)). On appeal, the Court of Customs and Patent Appeals affirmed the decision below.

Examining the history of Article III and the effect of the War of 1812 thereon, subsequent tariff legislation passed by Congress up to 1897, and relevant judicial decisions, Judge Baldwin concluded that Article III had been abrogated by the War of 1812. Although Article III was self-executing, nevertheless Congress had provided for an exemption from customs duties for Indians in the Tariff Act of 1799 and had continued this or similar provisions until 1897. The relevant provision was not re-enacted in the Tariff Act of 1897. The Court concluded that "we cannot revive the duty exemption which history and the law have firmly ended."¹

¹ 551 F.2d 1222, 1230.

BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

International Law as Applied by International Courts and Tribunals. Volume III: International Constitutional Law: Fundamentals, The United Nations, Related Agencies. By Georg Schwarzenberger. London: Stevens & Sons Limited, 1976. Pp. lii, 680. Indexes. £26.

This third volume of Professor Schwarzenberger's *magnum opus* provides fascinating reading, especially for active or retired judges of the International Court of Justice, although the publisher does not specifically list judges among those groups of readers to whom the volume is addressed. The author, of course, is not responsible for the blurb. This volume follows the schema reported by Richard Baxter in reviewing Volume II¹ in the series; this revised the original plan of the first volume which was reviewed in AJIL² 31 years ago.

In a work of such scope and erudition, it is difficult for a reviewer to do justice to all facets of the book. As I pored over the pages, I wondered why Professor Schwarzenberger had failed to mention this or that detail or related topic; I was at once brought up short by footnotes of the "above" and "below" type, or cross-references to other volumes of the series, or even to Volume IV which is still "in preparation." For example, at page 133 nine footnotes refer the reader to "below" pages ranging from page 134 to 516 plus a reference to the author's *Power Politics*, published in 1964. Obviously it is perilous for a reviewer to allege a sin of omission, and if any is here included I am prepared to plead *mea culpa*. In addition to nine pages of contents which serve as a guide, there are numerous tables as well as an index. Despite the readability of the author's style, the book is for the student rather than the running reader.

Since a large part of the volume consists of references to or quotations from not only the judgments and opinions of the International Court of Justice (ICJ) but also from dissenting and separate (or individual) opinions, a review must deal with that material and the conclusions drawn therefrom.

Page 16 reads: "In legal systems in which the judicial function is separated from those of political and administrative organs, it is unusual for courts or *members of the judiciary* [emphasis supplied] to take any initiative in deciding alleged breaches of the law or settling any dispute on matters within their jurisdiction." But it seems to me that the ICJ and many of its members now have a different philosophy. In *Fisheries Jurisdiction*, the Court said it "is of the view that there is nothing incompatible with its judicial function in making a pronouncement of the rights and duties of the Parties under existing international law which

¹ 65 AJIL 635 (1971).

² 40 AJIL 860 (1946).

would clearly be capable of having a forward reach.”³ So in *North Sea Continental Shelf*, the Court stressed its connection with Article 33 of the Charter in regard to negotiation and said “it is for the Court to facilitate, so far as is compatible with its Statute, . . . direct and friendly settlement.”⁴

On *compétence de la compétence*, this reviewer agrees with the emphatic statements of Rosenne⁵ and disagrees with Schwarzenberger (pp. 37–39) who thinks the well established rule is merely a “presumption.” But his acute characterization of the misnamed “Conciliation Commissions” set up under the Italian Peace Treaty (*cf.* p. 11) is welcome.

I am also perplexed by a statement on page 19 that it is equitable considerations which international organs use in settling frontiers, but a footnote tells me to see Volume I which I do not have at hand. In at least three cases before the ICJ, I believe legal considerations controlled, *i.e.*, in the boundaries between Nicaragua and Honduras, between Cambodia and Thailand, and between the Netherlands and Belgium.

To continue my difficulties, I miss more discussion of decisions reached in organs of the United Nations by consensus. There is a growing literature on this subject; note 2 on page 487 does not suffice. Treaty specialists may feel there is an oversimplification on rules of interpretation at pages 25 and 26, although I would not minimize the importance of *ius aequum* on which the author lays repeated stress.

Numerous references are made to the “purge” of the ICJ after the decision of 1966 on the *South West Africa* cases. No doubt the political reactions to that decision, reached after a tie by the casting vote of the President, Sir Percy Spender, were rather violent, but “purge” goes too far. It is not significant that, as Judge Sir Gerald Fitzmaurice is quoted as saying in 1971, “only four of those who then composed the Court now remain.” Of the four, two were in the castigated majority—Judges Fitzmaurice and Gros—and two in the minority—Padilla Nervo and Forster. Similarly to say that Sir Gerald “was the only surviving member of the 1962 judicial team” (in 1971) makes 1962 instead of 1966 the critical date. In one instance it might be said that the “purge” even worked against a fellow citizen of one judge, that fellow citizen being one of the most highly qualified jurists who ever stood for election to the Court.

I applaud Professor Schwarzenberger’s use of colorful adjectives when he comments on the Court’s decisions or on the view of individual judges; the Court needs criticism from competent scholars. We find at page 111 that the Court sought to maintain “a consistency of practice, however fictitious,” but “this exercise was hardly convincing.” On page 289 the Court “purported to ignore” realities. Elsewhere we find the terms “hypocritical” and “slightly mystifying.” In general, it seems the author uses the separate (or dissenting) opinions of the late Judge Ammoun and of Judge Sir Gerald Fitzmaurice as the opposite poles, with the author more

³ United Kingdom v. Iceland. [1974] ICJ REP. 19, para. 40.

⁴ [1969] ICJ REP. 47, para. 86.

⁵ I S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE* 438 *et. seq.*, especially at 441 with quotations from the *Nottebohm* case (1965).

nearly sharing the views of the latter. Judge Sir Hersch Lauterpacht believed he rendered more service to the development of international law through his individual opinions than through his other writings. This book will encourage judges to express their views in dissenting or separate opinions and the bulk of ICJ volumes may increase accordingly. This reviewer strongly recommends the study of pages 313-17 where there is a brilliant analysis of "apparent mysteries, oddities and intellectually unimpressive judicial performances." One awaits eagerly Volume IV of this series which will deal with "international judicial law."

There is not space here to deal with the voluminous material on other organs of the United Nations and the comparisons with their opposite numbers in the League of Nations. I miss, however, in the eleven chapters on the Secretary-General of the United Nations an exposé of the differing stands of the several holders of that office, especially Dag Hammarskjöld. There is some material on Trygve Lie. Some references to secondary sources are made in note 34, page 352, and in note 52, page 344, but there is good unused material in the Cordier-Foote volumes which are listed in the bibliography.⁶ (A minor item: questions of diplomatic precedence for the Judges and the Hague Diplomatic Corps (p. 499) are now covered.)⁷

Part Three of the volume deals with "Inter-Governmental United Nations Agencies" in some 180 pages. One has already had eight chapters (34-42) dealing with UN Service Law where there are notable contributions to the still inadequate literature on the administrative tribunals. I say "inadequate" despite the superlative studies of Mme. Suzanne Basdevant. Space limitations forbid further comment.

The late C. Wilfred Jenks blazed many new trails, among others those found in *The Common Law of Mankind* (1958) and *The Proper Law of International Organizations* (1962). Like the rest of us, Professor Schwarzenberger profited from those insights but Jenks would have welcomed this broadening and lighting of the trails which he had blazed. As I have already indicated, Judges of the ICJ should profit from this volume and find their appetites whetted for Volume IV on *International Judicial Law*.

PHILIP C. JESSUP

Hague Academy, *Recueil des Cours*, 1973. 3 Vols. (Vols. 138, 139, and unnumbered of the collection). Leiden: Sijthoff. Vol. I, 1974, Pp. 643; Vol. II, 1974, Pp. 447; unnumbered, 1975, Pp. 650.

The Hague Academy of International Law did not publish a public international law general course in these volumes. But the proceedings of a three-day Colloquium on *The Protection of the Environment and International Law* are published in an unnumbered volume of the set. The four rapporteurs of the colloquium delivered papers which were then discussed with 31 participants.

The first paper, *A General View of International Environmental Law*, by Professor L.F.E. Goldie (Syracuse, U.S.A.) describes what is called the

⁶ A. CORDIER & W. FOOTE, PUBLIC PAPERS OF THE SECRETARIES-GENERAL OF THE UNITED NATIONS (Vols. I-V, 1969-1975). ⁷ See [1970-1971] ICJ YB 1110-11.

"piecemeal and patchwork character of international law relevant to environmental protection" (p. 30). Nonetheless, his concise review of the general international law embodied in the *Trail Smelter* arbitration, the *Lake Lanoux* arbitration, and the *Corfu Channel* case shows fundamental agreement on principles. A short analysis of the principles of liability, including some discussion of the utility of interim measures to limit potential damage, demonstrates a basis for building a more comprehensive international control over activities of states that injure the seas, the air, or neighbor states' physical environments. Discussion of the organization now evolving for special types of polluting activity and of the general organization resulting from the Stockholm Conference of 1972 concludes with an argument in support of an international requirement for an "impact statement" on the pattern of the requirements of the U.S. National Environmental Policy Act of 1969.

Professor Alexandre-Charles Kiss (Strasbourg) writes on *Problèmes Juridiques de la Pollution de l'Air*. After pointing out that damages wrought by transfrontier pollution can frequently be alleviated by normal private law remedies, as in *Poro c. Houillères du Bassin de Lorraine* (Oberlandsgericht Saarbrücken, 1957) and as encouraged in the (then draft) Scandinavian Convention on the Protection of the Environment,¹ Professor Kiss points out in some detail that the general international law applied in the *Trail Smelter* arbitration includes rules requiring states to control emissions from their territories before damage is done and envisages close cooperation among neighboring states to protect the environment of both. After noting that the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies has codified these principles as they apply in that environment, Professor Kiss summarizes the development of the same principles in "soft law" resolutions and declarations of various conferences and organizations and mentions a number of treaties and examples of national legislation that apply them to particular types of polluting activity in particular states. He concludes with a review of the increasing cooperation among states in gathering data, exchanging views, and otherwise working within the existing legal order to limit transnational air pollution.

The third report, by Professor Jacques-Yvan Morin (Montreal), is titled *La Pollution des Mers au Regard du Droit International*. Beginning by classifying marine pollution into eight categories, Professor Morin examines in some detail the inconsistencies that have become apparent between the traditional and conventional rights of flag states and effluent-producing littoral states on the one hand and the needs of all states on the other to assure the continued availability of safe and productive seas. While some of these tensions are reduced by such legal devices as the contiguous zone and by various conventions consistent with the traditional distribution of powers in the international legal order, he concludes that many important

¹ Concluded in 1974. 13 ILM 591 (1974).

questions cannot be solved without much more thought than has as yet been given them.

Finally, Professor G. Gaja (Camerino, Italy) addresses *River Pollution in International Law*. In his view the major underlying concept of the law applicable to river pollution involves equitable utilization, but this concept expressed in 1966 in Helsinki as drafted by the International Law Association was rejected by the UN General Assembly in 1970 as the basis for codification. In the absence of a general codification, a network of specific agreements and the activities of regional organizations, with the cooperation of global international organizations, are establishing rules to govern the use and distribution of important river and lake resources.

A four-part report of oral proceedings concludes the special volume. The discussion was as diffuse as such proceedings usually are, but one short comment by Professor Kiss during the second part (p. 497) to the effect that the international law regarding pollution is in general "soft law," implying "soft liability" or "soft responsibility," seems to have seized the imagination of many of the eminent participants as a valuable insight.

Short 50th Anniversary tributes to the Hague Academy and related bodies were delivered by Frede Castberg, Dr. J. H. van Roijen, René-Jean Dupuy, Charles de Visscher, and Sir Gerald Fitzmaurice.

Roberto E. Guyer's (Under Secretary-General of the United Nations) *The Antarctic System* appears in the regular series of lectures delivered in 1973. The conflicting legal claims to sovereignty in the Antarctic he sees as a reflection of conflicting principles of territorial acquisition by "effective occupation," which would benefit the northern hemisphere powers such as the United States and the USSR, and by application of geographical and geological principles, which would benefit the southern hemisphere powers such as Australia and Argentina. These conflicts were laid aside by the parties to the Antarctic Treaty of 1959, and the current distribution of international powers and responsibilities in Antarctica under the Treaty is lucidly set forth with much anecdotal detail. While a reader may not agree with all the interpretations suggested by Dr. Guyer, this is clearly an "insider's" account which cannot be ignored by students of international interaction in the Antarctic.

Professor Guy Ladreit de Lacharrière (Paris) gave a short course titled *L'Influence de l'Inégalité de Développement des Etats sur le Droit International*. In it, he points out the impact of historical, political, and economic considerations on views expressed by states with regard to asserted norms of international law.

The Illegal Diversion of Aircraft and International Law is the subject of the course by Professor Edward McWhinney (Simon Fraser, Canada). He begins by pointing out that traditional and current definitions of "piracy" do not technically apply to the aircraft hijackings undertaken for political ends and not involving the use of a second vehicle; that many quite different motivations and many types of organizational allegiance have been involved in aircraft hijacking; and that the constituents of several different international organizations, such as the United Nations (states), IFALPA

(pilots), ICAO (states parties to the 1944 Civil Aviation Convention), and IATA (commercial airlines), join with passengers as groups able to exert pressures to seek various means to prevent hijacking. After reviewing the Tokyo, Hague, and Montreal Conventions, prescribing rules by which states cooperate to limit hijacking, and problems of implementation, Professor McWhinney concludes that bilateral or regional agreements have been more effective, particularly the US-Cuba informal arrangements preceding the accord of February 15, 1973. The screening of passengers and cargo urged by IATA and the boycott of haven countries threatened by IFALPA seem very effective, as do unilateral acts by states through their own anti-hijacking legislation and regulations. Professor McWhinney then notes the possible effect of passenger suits against airlines under the absolute liability provisions of the Warsaw Convention as modified by the Montreal Agreement of 1966, spreading the costs of injury to passengers caused by hijackings through insurance to all the flying public. He analyzes briefly the differences in values that result in some states accepting aerial hijacking as a legitimate way of fleeing oppression or pursuing a political goal and others urging the harshest repression. The course concludes that the chaos of private sanctions and fundamental considerations of economy in the use of force, as well as political feasibilities, make national measures, including fuller use of extradition, the most attractive means for further action to limit aerial hijacking.

Professor Marcell Merle (Paris) addresses *Le Droit International et l'Opinion Public*. Organized public opinion expressed by governments, like the unhappiness expressed through many channels with the ICJ decision of 1966 holding that Liberia and Ethiopia did not have standing to present a case against South Africa based on the League of Nations South West Africa Mandate, is distinguished from unorganized public opinion, such as the revulsion of individuals and NGO's from the policies of *apartheid*. Both have their effects in international politics and in influencing the development of international law. But public opinion is not law, and this short course ends with a caution that it is the dialogue between public opinion and norms of international law, not the slavish following of either, that assures the progress of society toward justice.

International Organization and Collective Security: Changing Values and Priorities is the title chosen by Ernest A. Gross (former Legal Adviser, U.S. Department of State). The principal international organization concerned with collective security is, of course, the United Nations. There the great powers with special responsibilities or, more accurately, claiming special privileges in this area, have predictably focussed more on their individual national interests than on the needs of the international community for peace and security. Similarly, regional collective security organizations depend ultimately on individual decisions by their members as the legal basis for collective action. But the line between national interest and the common interest of all nations is not so clear as frequently pretended. Mr. Gross suggests that a number of changed perceptions, such as the enhanced place of the individual and nonstate actors on the international stage, make

the traditional concentration on the technical mechanisms of state-to-state dispute settlement not only unrealistic but essentially misplaced in both theory and practice. The thesis is worked out with insight and imagination in a short but tightly packed course.

The late Dr. C. Wilfred Jenks (Director-General of the International Labor Office) spoke on *Economic and Social Change and the Law of Nations*. In an erudite essay he uses historical insights to trace developing legal relations which reflect radical technological change and powerful conceptions of economic and social rights as part of the human condition regulated by international law. He pleads for wider discretionary powers in some international organizations concerned with human rights as a stop-gap until the very distant day when it might be feasible to establish a true world legislature.

Courses in 1973 of primary interest to scholars of private international law included: the *Cours Général de Droit International Privé* given by Yvon Loussouarn (Paris); *Le Conflit de Lois Interpersonnel dans les Pays en Voie de Développement* by Istvan Szaszy (Budapest); *La Convention de la Ligue Arabe sur l'Exécution des Jugements* by Ezzedine Abdallah (Ein Shams, Egypt); *Peremptory Norms and Private International Law* by Hilding Eek (Stockholm); *Le Pluralisme des Méthodes en Droit International Privé* by Henri Battifol (Paris); and *Réflexions sur les Principes Généraux de la Responsabilité Civile des Pays Socialistes sous l'Aspect du Droit International Privé* by Witwold Czachorski (Warsaw).

ALFRED P. RUBIN

Sharing the World's Resources. By Oscar Schachter. New York: Columbia University Press, 1977. Pp. xii, 172. Indexes. \$7.95.

The past writings of Oscar Schachter share enviable qualities. They are lucid. They rest on a base of detailed knowledge about the theme explored, whether doctrinal, institutional, political, or historical. And they inform that theme with a sense of its larger relevance, with concepts of broader reach, with theory. Schachter manages to be both sensible and interesting, practical and speculative.

This slender book is no exception. Growing out of the Rosenthal lectures at Northwestern University Law School, it has the style of an overarching essay. It offers the broad view and dispatches detail to a slight but sufficient base of footnotes.

If the setting is contemporary, the theme is eternal—distributive justice. Schachter examines the ideas and forces at work in shifting the world's resources, in seeking an equitable sharing of natural and manmade wealth. That wealth embraces the mineral and food resources of land and oceans, purity of atmosphere, and industrial goods and technology as well as the capital to acquire them. The problems of equitable sharing range from deep sea mineral exploration, to amounts of compensation for expropriation, to just prices for basic commodities.

The essay suggests a framework of concepts within which the rhetoric—

claims and responses—of international redistribution can be understood. That framework stresses such traditional ingredients of normative argument as “need” and “legitimate expectation” or “historic entitlement.” These are the very concepts at work in resolving distributional issues within the modern welfare state. Each of them is rich in ambiguities: “need” to satisfy whose and what wants or goals, to be met from whose present wealth, under what conditions, through which institutional arrangements, and so on. Whatever the ad hoc, instrumental use of such criteria of fairness or justice, Schachter forcefully demonstrates that issues of distributive justice are now within the mainstream of political contests, normative claims, and legal argument.

Viewed even from a formal and positivist perspective, the body of international law no longer stops at marking boundaries, containing interferences of one territorial sovereign with another, and creating minimal frameworks for limited cooperation. It accommodates more argument and doctrine, of both a conventional and customary nature, that have explicitly distributional consequences. As we move from a consensus over three-mile boundaries and diplomatic immunities or from the issue of the *Lotus* case to contemporary problems, international law’s pretention of serving as a neutral framework for intercourse among states fades rapidly. That law’s origin in political disputes, in conflicts over interests and values, becomes starkly evident. Schachter’s excellent book reveals how normative theories, raw power, and common needs interact in this period of tension and change. It suggests how common principles on the sharing of resources may slowly emerge.

HENRY J. STEINER

World Treaty Index. By Peter H. Rohn. Santa Barbara and Oxford: ABC Clio Press, 1974. Five volumes. Pp.: I, xliii, 329; II, ix, 566; III, ix, 519; IV, ix, 827; V, xvi, 812. *Treaty Profiles.* By Peter H. Rohn. Same publisher, 1976. Pp. 256. \$375 for the set.

The *World Treaty Index* and *Treaty Profiles* are the primary public outputs of Rohn’s extensive enterprise widely known as the Treaty Project, housed in the Treaty Research Center at the University of Washington in Seattle. They are the visible tip of an iceberg, an outcropping of a massive data base accumulated over ten years and serving today as an expanding source of computer printouts supplementing the *Index*.

The *Index*, based on data compiled in a machine-readable form, covers some 5,000 treaties contained in the 205 volumes of the League of Nations Treaty Series (LNTS), about 11,500 treaties in the first 700 volumes of the UN Treaty Series (UNTS), and some 6,000 additional treaties in national treaty collections. The coverage is far from complete. It extends generally from 1920 to 1970. Excluded are all multilateral treaties and many bilateral treaties not published in UNTS and LNTS. Yet, no other treaty index even approaches the scope of Rohn’s compilation.

The information provided for all indexed treaties includes the source document, citation and serial number; the title of the instrument, parties,

and treaty topic supplemented by a keyword; and the date of signature. Entries for treaties in the UNTS and LNTS also show the date of entry into force, subtopics, references to nonsignatories, to international organizations, and to other treaties, and other formal and procedural data such as the number of treaty articles, official languages, registrants, amendments, and reservations.

The *Index* materials are efficiently organized in five volumes. The first three contain the main entries arranged by source (LNTS, UNTS, and national collections) and serial numbers. Volumes 4 and 5 include specialized sections. The chronological section spanning the 1920-70 core period is arranged by the date of signature. The party section provides access to bilaterals through either party and to multilaterals by every original party, alphabetically arranged. Of special significance is the international organization (IGO) section; it identifies, under the name of the organization, all instances where a treaty mentions an IGO and confers a function on it. (This is in addition to the listing of treaties to which an IGO is a party.) The IGO reference section is a feature unique to this *Index*. The next two sections aid topical searches by pinpointing treaty topics. One, in Volume 4, uses the topical index of the UNTS itself; the other, comprising Volume 5, follows a special *Index* system of eight clusters of topical categories divided into 68 main topics and 530 topical concepts.

Rohn's *Index* falls within two distinct yet related conceptual domains of the modern study of international law—nonlegal approaches and quantitative methods. The *Index* itself is not a quantitative study, but it has been deliberately designed to help in the examination of sets of quantitative data. The companion volume, the *Profiles*, a statistical analysis of national, regional, and global treaty patterns, represents a step in that direction. It provides for each country and organization information on its top 30 treaty partners as well as regional groups, time trends, topical data, reliance on IGO's, and other data.

It is in this area that the *Index* is of great interest. While it has considerable utility for lawyers, its primary potential function is to supply social scientists examining the international legal system in its broad social and economic context with a body of flexible statistical data that can be arranged in numerous and varied patterns of considerable explanatory significance. For instance, those interested in the employment of arbitration procedures in treaty relationships can see at a glance at the IGO section the vast differences between treaties of the League era and those signed after World War II. The entries also indicate the dominant theme of every treaty setting up an arbitration mechanism; in recent decades, for instance, air transport agreements provide for arbitration more often than any other treaty category. A similar mode of inquiry may be pursued to see the reliance by different treaty partners on IGO's of various types.

The more technical limitations of the *Index* lie largely in the scope of its coverage. In terms of its timespan, it extends to 1970 and slightly beyond but, for the purposes of macroscopic studies based on aggregate data, its usefulness ends at around 1968 or 1969.

Another and more serious limitation is in the country coverage. Since not all treaties are published in the LNTS and UNTS, Rohn utilized national treaty collections as a supplementary source. Starting with major countries with low rates of treaty registration in UNTS (China, France, Germany, Italy, Japan, USSR), the supplementary sources comprise 25 countries from 42 treaty lists. That coverage is actually larger because it inevitably includes treaties between those 25 countries and others not selected for coverage. However, many treaties especially among the Third World states are excluded as are all multilateral treaties not shown in the LNTS and UNTS.¹

The third technical limitation is set by the topical coverage. The guide to treaty topics effectively combines a list devised for the *Index* with the aid of the extensive topical categories of the UNTS index. However, some important topics are inadequately treated. For instance, the *Index* topical list has no entries for the law of the sea or its various subdivisions. The UNTS topical categories include "law of the sea"; under it, however, are entered only three of the 1958 Geneva Law of the Sea Conventions (Territorial Sea, High Seas, and the Optional Protocol on Dispute Settlement). The other conventions have to be looked up under "continental shelf" and "fishing." All other law of the sea topics are dispersed under a dozen different headings directly relating to the sea, but even then many law of the sea treaties seem lost within general categories.² Consequently, a macroscopic question such as whether the conclusion of law of the sea treaties increases or diminishes during a protracted multilateral negotiation, such as that preceding the 1958 Law of the Sea Conference, cannot be answered by reference to the *Index*.

Since a spot check evaluation of a work of the dimensions of the *Index* necessarily reflects the research bias of the reviewer, I resorted to the unorthodox method of consulting a number of colleagues regarding their experiences with it. Very positive views were expressed by those who seek access to basic information on individual treaties and by social scientists primarily interested in broad trends and patterns such as those presented in the *Profiles*. Reservations were voiced by researchers oriented toward more specialized and contemporary phenomena in international legal and political practice. Some of the critical comments centered on the incomplete and outdated coverage of particular Third World treaty relationships; most of them related to the inadequacies of the topical and organizational indexes. In the final analysis, however, most of the negative comments only underline the high value of the *Index*. The majority of critics, encouraged by what the *Index* offers, would like to get still more.

¹ E.g., the Indonesia-Malaysia agreement on continental shelf boundaries, signed on October 27, 1969, is not included. A spot check of twelve Third World bilateral agreements arbitrarily selected by this reviewer resulted in eight blanks.

² E.g., the Iran-Saudi Arabia agreement of October 24, 1968, on the delimitation of their adjoining continental shelf has been assigned the topic "territory boundary," but it cannot be located through any of the topical indexes, not even under the topic concept "boundaries of territory" (Vol. 5).

The *Index* unquestionably belongs in the library of all colleges and universities with even marginal academic involvement in the study of international relations. It exceeds by far in its completeness and diversity any other access route to treaty law and its political and socio-economic patterns.

Rohn's contribution to the study of international legal patterns and trends should not merely be acknowledged, it fully deserves to be carried forward by those able to build on the foundation he has created so painstakingly at a great personal and professional cost.

ZDENEK J. SLOUKA

International Law in Historical Perspective. Vol. VIII. By J. H. W. Verzijl. Leiden: A. W. Sijthoff, 1976. Pp. ix, 646. Indexes. \$65.

Part VIII of Dr. Verzijl's projected nine-part review of the historical roots of the substantive norms of international law¹ is titled "Inter-State Disputes and Their Settlement." The volume begins with short, clear and learned discussions of retorsion, reprisal, and pacific blockade as legal terms that have been used by states to justify unilateral action short of war and a few pages outlining the history of nonbinding third-party involvement in dispute settlement through good offices, mediation, inquiry, and conciliation. But the major portions (about 530 out of 607 pages of text) are devoted to a deep and well-organized study of binding third-party dispute settlement in the form of arbitration and judicial settlement. Precedents dating from the dawn of recorded history appear; detailed discussions are set forth of medieval and renaissance practices that underlie the current law; and cases as recent as the 1974 ICJ pronouncement in the *Nuclear Tests* cases (Australia v. France and New Zealand v. France) and the 1975 *Western Sahara* advisory opinion are included.

As in previous volumes, there are some unexpected lacunae. For example, in the discussion of reprisals there is no mention of the *Nautilaa* arbitration² frequently cited in the United States as the classical formulation of the law. The authoritative 1934 *Règlement* of the *Institut de Droit International* covering much the same ground is set out *in extenso*. The discussion of state responses to "terrorism" is confined to an analysis of the not yet abandoned 1937 proposal for an international criminal court³ and the reluctance of states to undertake obligations to extradite "political" offenders (pp. 348-62).

As in past volumes, the author's acerbic comments enliven the text: "Worst of all is, of course, when a court of justice allows itself to be swayed

¹ The earlier parts were reviewed at 64 AJIL 448 (1970), 65 AJIL 220 (1971), 66 AJIL 884 (1972), 67 AJIL 361 (1973), and 69 AJIL 466 (1975). The work received the Certificate of Merit of the American Society of International Law at the Society's 1970 annual meeting.

² Portugal v. Germany, 8 TRIB. ARB. MIXTES, 2 R. INT. ARB. AWARDS 409 (1928); briefed in BRIGGS, THE LAW OF NATIONS 951 (2d ed. 1952), BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 903 (3rd. ed. 1971).

³ See 67 AJIL 508-11 (1973) and 68 AJIL 306, 717 and 718 (1974).

in its final verdict by political considerations, or the current trend of public opinion . . . In this respect the Judgement in the *Nuclear Tests* case (1974) is indeed a lowest point in the Court's case law" (p. 530).

This series of volumes is a high point of international law scholarship and insight and remains a delight to read.

ALFRED P. RUBIN

L'Enquête Internationale dans le Règlement des Conflits. Règles juridiques applicables. By Tabrizi Bensalah. Paris: Librairie Générale de Droit et de Jurisprudence, R. Pichon et R. Durand-Auzias, 1976. Pp. xi, 269. Index. F. 85,00.

This study, prefaced by Professors S. Bastid and M. K. Yasseen, is a thorough analysis of every aspect of inquiry. It raises pertinent problems and offers solutions.

The book is divided into two parts, dealing respectively with bilateral inquiry (*l'enquête autonome*) and inquiry in the framework of international organizations (*l'enquête intégrée*). The latter part is devoted to the use of inquiry both in the handling of political disputes and in the application of conventions on specific, mostly technical, matters. Each type of inquiry is examined with regard to its constitutional background, as well as the composition, procedure, and function of the commissions of inquiry. A comparison is often made between the various aspects of bilateral and multilateral inquiry. Thus, Bensalah observes that, unlike bilateral commissions of inquiry, those set up by international political organizations are often charged with inquiries into historical, political, economic, and sociological factors which have no immediate bearing on the dispute (pp. 178-80).

On a more general plane, the author draws attention to a "paradox" regarding the restricted use of bilateral inquiry and the extensive use of multilateral inquiry. In spite of its unity and stability, bilateral inquiry has been resorted to in only a limited number of cases. On the other hand, multilateral inquiry, in spite of its lack of uniformity, has been used by international organizations as a matter of course. According to the author, this disequilibrium reflects dissatisfaction with the bilateral settlement of conflicts and a preference for collective settlement (p. 221). The latter inference does not seem to be well founded. Resort to bilateral inquiry, although limited, has been successful and satisfactory as demonstrated in this book. The explanation for the limited resort to bilateral inquiry should be sought in the reluctance of states to submit their disputes to a body which is similar to an arbitral tribunal, both as regards its procedure and the effect of its findings. Indeed, reports of inquiry commissions on the facts of the dispute have clearly indicated which party was responsible for violation of the law and have thus served as a basis for settlement.

As far as the asserted preference for multilateral settlement is concerned, it may be noted that the evidence points to a growing dissatisfaction with recourse to inquiry by international political organizations, notably the

United Nations. A close scrutiny of the UN discussions on the question of inquiry (1962-67) would reveal that, in the view of many states, political considerations prevalent in the United Nations are likely to prejudice the impartiality of UN investigating bodies. At the culmination of the discussions, the predominant trend was to promote first and foremost fact finding in the direct service of individual states, rather than in the service of UN organs. This trend found expression in General Assembly Resolution 2329 (XXII) of December 18, 1967,¹ in which the Assembly requested the Secretary-General to prepare a register of experts whose services the "*States parties to a dispute* may use by agreement for fact-finding in relation to the dispute." (Italics supplied.) It may also be noted that, according to the late Secretary-General U Thant, the UN system of ad hoc bodies for inquiries into the observance of human rights might be viewed as "somewhat precarious and liable to inspire a lesser degree of confidence."²

One of Bensalah's main conclusions is that bilateral inquiry is not a method of settlement of disputes. It only contributes to their settlement (p. 115). This view seems to contradict the author's own definition of "method of settlement" as "la procédure qui contribue à la solution d'un litige soit par le rapprochement des Parties concernées soit par une décision d'un organe tiers" (p. 114). In fact, commissions of inquiry help to bring about the "rapprochement" of the parties by providing them, upon their own request, with an authoritative opinion on the main issue of the dispute. This function of the commissions is acknowledged by the author (pp. 115-17).

Notwithstanding the above debatable points, the book is most valuable for its comprehensive elucidation of the process of inquiry.

NISSIM BAR-YAACOV

Wypowiedzenie Umowy Międzynarodowej (Denunciation of international treaties). By Maria Frankowska. Wrocław, Warszawa, Kraków, Gdańsk: Ossolineum, for the Polish Academy of Sciences, Institute of Legal Sciences, 1976. Pp. 263. Bibliography. Z1.46.

This meticulously researched and cautiously reasoned book concerns a narrow but interesting and partly controversial subject. Contrary to the title, the topic has been restricted to a unilateral denunciation of a treaty by one of its parties based on the *right* to do so explicitly stipulated in the treaty itself or an additional agreement, or implicitly intended or admitted by the parties. *Clausula rebus sic stantibus* and serious violation of essential treaty provisions, the most commonly used grounds for abrogation and withdrawal, are excluded from the author's consideration.

The book discusses first in a systematic manner the concept and form of denunciation of an international treaty, the entering into force of the denunciation, the functions of the depositary of a treaty, the right to revoke the denunciation, and to make the denunciation conditional, as well as the

¹ 22 GAOR, Supp. (No. 16) 84, UN Doc. A/6716 (1967).

² Report of the Secretary-General. UN Doc. A/8052, para. 246 (Sept. 18, 1970).

legal effects of such a denunciation. The conditional type of denunciation seems particularly interesting and topical now. The author remarks that the United States likes to resort to this legal means of pressure and mentions, among others, the conditional withdrawal in 1965 from the Warsaw Convention of 1929. Obviously, the pending American conditional withdrawal from the International Labor Organization seems to confirm the author's observation.

After presenting diligently gathered statistical data concerning the number of treaties, bilateral and multilateral, containing or lacking a denunciation clause, the author discusses the right of denunciation agreed upon outside the text of the treaty. Three examples are presented: adherence of the United States to the Statute of the Permanent Court of International Justice, and to the Constitution of the World Health Organization (WHO) as well as the declaration of interpretation adopted by Committee I/2 and approved by the San Francisco Conference concerning the right of withdrawal from UN membership.

The author places special emphasis on the chapter on the implied right of denunciation when the treaty is silent. There is considerable divergence of opinion among international scholars. The traditional view negates such a right. Some authors, however, accept such a right although it flies in the face of the basic principle *pacta sunt servanda* (K. Bluntschli, E. Giraud). Others, mostly British, stress the *intention* of the parties as the criterion whether such right exists in relation to a specific treaty.

A review of state practice (including the temporary withdrawal of Communist states from WHO and UNESCO and Indonesia's equally temporary withdrawal from the United Nations) proves that the presumed right to withdraw has been very rarely invoked and never as an exclusive ground for abrogation. No sufficiently established and general practice exists in this respect.

Article 56, paragraph 1, of the Vienna Convention on the Law of Treaties proclaims the inadmissibility of denunciation and withdrawal when the treaty is silent, but with two exceptions: (a) when it has been established that the parties *intended* to admit the possibility of denunciation or withdrawal, and (b) the *character* of the treaty allows a presumption of such a right. The latter exception was adopted as a British amendment. The author persuasively argues that the introduction of the character of the treaty as a separate ground justifying denunciation represents a dangerous innovation weakening the principle of *pacta sunt servanda* and is not based on past or current practice of states nor on prevalent doctrine. The Vienna Convention leaves the meaning of the character of the treaty vague and thus liable to abuse by the denouncing party. Ironically, the author considers constituent instruments of international organizations, including the UN Charter, as falling within this category because of the danger that the organization may become a political tool of the states commanding the majority of votes. Such an opinion may now sound familiar to American ears. Sir Humphrey Waldock's 1957 draft for the International Law Com-

mission enumerated several categories of treaties where the right of denunciation was admissible (treaties relating to trade, alliances, social and cultural matters, and communication). No such right exists in peace treaties, treaties defining borders or establishing an international regime for a territory, river, sealane, or air space. An international organization to maintain peace seems to this reviewer to belong in the no withdrawal category.

The author places all international organizations on the same level. Furthermore, in her comprehensive statistics she distinguishes only between bilateral and multilateral treaties. Therefore the results of counting are of doubtful value. Something similar seems to occur with opinions of international law scholars. They have to be weighed besides being counted. But these are comparatively minor deficiencies in a valuable contribution to learning.

There is a detailed English summary.

ALEKSANDER WITOLD RUDZINSKI

Positions Internationales de la Russie Sovietique. By H. A. Schwarz-Liebermann von Wahlendorff. Paris: Librairie des Cinq Continents, 1977. Pp. 309.

Can international lawyers in the West conclude that when Soviet scholars speak of acceptance of the principles of general international law, they mean those enshrined in the Statute of the International Court of Justice as the "general principles of international law"? Schwartz-Liebermann decides after a lifetime of study of Russian and Soviet philosophy that they cannot. Soviet thought is in terms of the community, epitomized by the existence of the same word for "peace" and the historic peasant community, the *mir*. This historically created base has now been topped by Marxist doctrine, capsulized in the phrase "personal freedom is possible only in the collective."

Schwarz-Liebermann's conclusion is not new, as readers of this *Journal* know well. What is important is that it comes now from a longtime analyst in Western Europe who reflects the disillusionment with Soviet policy which has swept Western Europe since the Czechoslovak events of 1968, finding expression most recently in Eurocommunism. If it is correct, it spells ineffectiveness for the current Helsinki-based campaign to foster the principle that human rights are no longer exclusively a domestic affair of the Soviet Union. It suggests that for Brezhnev there is no higher value than the collective to which the individual for his own good must be subservient, and even goals such as increased trade and reduction in armaments will be set aside until the basic issue of the interpretation of what is meant by "human rights" is left for each bloc to decide for itself.

Schwarz-Liebermann's contribution, beyond restatement of a widely accepted conclusion, is the material presented in proof of its validity. He reviews the impact of Byzantium, of Tsarist expansionism, but most especially the underlying thought of Russia's poets and philosophers from Chadaev to Solovov. Hardly a familiar figure is omitted. Russians are seen to have been messianic and collectivist. Dostoevski is cited for his

espousal of Russia as the "new word," the source of "resurrection and renewal for all humanity." Tolstoi is cited for espousal of the collectivity, transpersonalized categories if not depersonalized ones. Pushkin and Lermontov are represented by their poems, without further commentary from the author.

In consequence of these varied influences, Schwarz-Liebermann argues, the Soviet Union knows no science of law, but only a legal attitude which sees law as having a role to play as the slave of "scientific truth," which is Marxism. Law is not to be conceived as having an existence by itself. It is linked to the state, so that "my law" is substituted for "law," with the result that Soviet diplomacy sets as its task protection of the USSR as judge in its own case. There is resistance to third-party umpires.

This book will prove fascinating to those who enjoy intelligent reflections on the meaning of Russian history and Russian thought. That is its strength, written as it is from a profound knowledge of the subject. Whether the reader will accept its thesis depends on what he thinks of philosophical motivation of diplomatic positions. It is interesting to type peoples, and this reviewer enjoys the game. Some will think contemporary diplomats are moved by simpler power considerations, which are universally comprehensible without a knowledge of Byzantium, Pushkin, and the Slavophiles.

JOHN N. HAZARD

Restless River: International Law and the Behavior of the Rio Grande.

By Jerry E. Mueller. El Paso: Texas Western Press, 1975. Pp. xiii. Index. \$8.00, cloth; \$5.00, paper.

La Frontera Norte de Mexico: Historia, Conflictos. By Cesar Sepúlveda. Mexico: Editorial Porrúa, S.A., 1976. Pp. 168.

The border between the United States and Mexico is nearly 2,000 miles long and is rich in history. The above books document that often turbulent history and provide insight into the difficulties in negotiating and drafting treaties concerning that boundary.

Detailing how President Polk provoked the war over the Texas boundary in order to take California and other Mexican territories under cover of war, Sepúlveda provides a thorough discussion of the negotiations and of the Mexican viewpoint and contemporary reaction to the American actions. The Treaty of Guadalupe Hidalgo, February 2, 1848, put an end to "Una Guerra Injusta," in the words of Sepúlveda, and established the boundary. But, as Sepúlveda points out, it is one thing to divide two countries on paper but quite another to fix the boundary on the land. After two false starts, the United States in 1850 designated John Bartlett, whom Mueller describes as having "no qualifications whatsoever," as Commissioner of the American survey party.

When the American Commission began planning its survey, it discovered that the map on which the Treaty was based placed El Paso and Juarez 34 miles farther south and 130 miles farther west than they actually were.

This would have given Mexico considerably more territory than the Treaty intended. Mueller relates that Bartlett achieved a compromise which insured U.S. possession of the rich Santa Rita copper deposits, but which gave away the only possible route for a southern transcontinental railroad. When Franklin Pierce became President, James Gadsden was appointed Minister to Mexico and was given orders to buy the disputed tract of land extending west from Juarez so that the southern railroad route could be assured.

The Treaty provided that the boundary between Texas and Mexico should be in the center of the Rio Grande and that the boundary would move if there was a "slow and gradual" channel shift but that it would not move if the channel shifted avulsively. This language in the Treaty laid the ground for the famous Chamizal controversy between the United States and Mexico. The river in the El Paso-Juarez area moved to the south in the latter part of the 19th century. The Mexicans argued that, since the shift was not slow and gradual, it had to be avulsive. The Americans countered that the shift may not have been slow and gradual, but neither was it avulsive. Consequently the matter was committed to arbitration, with the Canadian jurist Eugene Lafleur presiding. On the critical question of title to the disputed land, the Commission, with Commissioner Lafleur and Mexican Commissioner Puga constituting the majority, arrived at a decision that Solomon would have applauded—the United States would obtain title to all land North of the 1864 channel and Mexico would receive title to all land South of the 1864 channel. Mexico accepted the award, but the United States rejected it on the basis that the award did not conform to Article III of the Convention of Arbitration of 1910 which states that "The Commission shall decide solely and exclusively as to whether the international title to the Chamizal Tract is in the United States of America or Mexico." The American member of the arbitration Commission argued that the Commission was not empowered to divide the tract but must award it either to Mexico or to the United States. The dispute was finally settled fifty years later, when President Kennedy chose to give effect to the international arbitral award and thereby remove a black mark that had been held against the United States throughout Latin America.

The Mueller book brings the river boundary of the Rio Grande up to the 1970 Treaty with Mexico and provides some interesting analyses of the international law relevant to river boundaries. Sepúlveda extends the discussion to the remainder of the boundary between El Paso and Tijuana and, in so doing, discusses the major disputes concerning transboundary resources, including the 1944 Colorado River Treaty, the salinity question on the Colorado, and the final adjustment of the U.S.-Mexico frontier in 1970.

These books are highly recommended to all interested in the boundary and resource disputes between the two countries. They provide excellent insight into the international legal issues, the difficulties in reaching agreement, and the possibilities for conflict over the written text of international

conventions. They should be read together so that the reader will get a two-dimensional appreciation of those conflicts and agreements.

ALBERT E. UTTOM

Conflict in Africa. Concepts and Realities. By Adda B. Bozeman. Princeton: Princeton University Press, 1976. Pp. xiv, 429. Bibliography. Index.

The underlying theme of this study is the contrast between an irenic-orientated Western world and a conflict-governed Africa. "Peace within the morally and politically unified society [of the West] has . . . been traditionally experienced not only as a supreme value but also as a distinct, definable and attainable social condition" (p. 4). Contrariwise, "Peace [in Africa] . . . is by no means the dominant value . . . and conflict, far from carrying essentially negative connotations, is widely accepted as a positive, socially structuring force" (pp. 18 and 221).

The ascription of positive values to conflict originates, in Professor Bozeman's view, from the fact that "[t]he modern culturally syncretic African state . . . does not provide reliable norms and institutions for the governance of political behavior. This vacuum invites capricious conduct on the part of the ambitious and the powerful . . . [and] conduces to the proliferation of all manner of tensions and conflicts (pp. 28-29). "[P]ower is the major reference in this culture's inner normative order" (p. 149). In a society which is profoundly illiterate and kinship-orientated (pp. 69, 123) and which rejects the identity of the individual (p. 240), "power is always and everywhere, in the final analysis, associated with magic," itself presumed to be aggressive and malevolent (p. 149). It is power that feeds on sorcery, mythical visions, the occult, and supernatural (p. 236), invisible mediators (p. 259), consultation of ancestors (pp. 181, 260), ritual violence (Chapter 13), fear and verbal aggression (p. 166). "In a system of mystical participation in which power is pitted against counterpower, opposition and antagonism become the ruling dynamic. All relationships . . . are thus by definition conflict relations" (p. 149).

The consequences, in terms of international relationships, are rejection of human rights and self-determination except in white-ruled Africa (pp. 35 and 240), of judicial settlement and arbitration (pp. 17, 243 and Chapter 16), and of contractual obligations (p. 241 and Chapter 20). In the field of commercial relations, trade is viewed as "a species of war" (p. 318).

The author's purpose in contrasting the West and Africa is to establish comparisons of all culturally discrete vocabularies of conflict so as to open up new avenues for mutual adjustments (p. 19). One is compelled, however, to question whether, on such negative findings, a case has been made for requiring the literate West to adjust to conflict "control" based on illiteracy, sorcery, and ancestor consultation.

This volume felicitously and usefully expands the author's study of African society presented in her earlier work: *The Future of Law in a Multicultural World*.¹ Somewhat perplexing, however, is the failure to

¹ Reviewed in 66 AJIL 422 (1972).

examine the contributions of the Fermada Workshop, or the studies of Doob, Foltz, Stevens, Morison, Stevenson, Alexandrovich, and Andemichael in conflict in Africa. Nevertheless, in breadth and insights this work constitutes a highly valuable contribution to an understanding of African attitudes towards conflict management.

JOHN H. SPENCER

Genocide in Paraguay. Edited by Richard Arens. Philadelphia: Temple University Press, 1976. Pp. 171. \$10.95.

"Nits make lice," is the sort of encouragement for massacre that Colonel Chivington offered his men during the extermination of men, women, and children of the Cheyenne nation in 1864.¹ But no one guns down the Indian today. One might think so, but *Genocide in Paraguay* proves such an assumption wrong.

Much of this extraordinary, multidisciplinary work is a detailed and historic documentation of the Indian hunts, the slavery, and the destruction of human dignity and a human culture that still occurs in Paraguay as well as in other Latin American countries. The reader's attention is arrested and then his conscience becomes uneasy, because the arrogant and murderous "conditioning" of the Indian (the destruction of "identity," dignity, and authority) is too close to home. As one contributor, Eric Wolf, generalizes, "we have mixed our cement with human blood."² The heavy U.S. investment in governmental aid to Paraguay³ and our 18th and 19th century treatment of black slaves and Indians should sharpen our sense of responsibility.⁴

Particularly useful for lawyers and others concerned with the lack of public and governmental outcry in the face of genocide and other attacks on people and their dignity is the psychiatric commentary provided by Dr. Chaim Shatan. Here one reads of the intricacies of individual and group response to atrocity, the effects upon "other" victims (there are *many*), and the danger posed to democratic values. Oppression, control, transfiguration, and apathy are aspects of a dehumanizing power process that grips surviving victim, aggressor, and viewer in a spiral of psychic-numbing and degradation. We are, quite often, viewer victims. As Dr. Shatan might add: "Concepts of genocide are beyond our grasp; they anesthetize as they publicize . . . when we see human cord-wood bulldozed into mass graves, our own sensibility is dulled. Statistics do not bleed; they numb."⁵

The refusal to know and to act is a theme expanded in the "lawyer's summation" by Arens. He condemns the contributing "tolerance" in American foreign policy, wrapped in the language of Article 2(7) of the UN Charter and a thinly veiled and highly questionable pragmatism, as being "indistinguishable from moral, and indeed legal, complicity."⁶ Al-

¹ See J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 *MIL. L. REV.* 99, 163 n.241 (1972).

² Arens, at 56.

³ *Id.* at 4 and 143-45.

⁴ *Id.* at 97-99.

⁵ *Id.* at 106-07.

⁶ *Id.* at 169, *passim*.

though I do not presently agree with such a legal conclusion, despite recognition of a relative "guilt," his summation is compelling. His analyses of the illegality of activities in Paraguay under the Genocide Convention and general human rights law, of "psychic death," of what might be termed psychic murder or manslaughter, and of the inadequacies of the state-dominated UN and OAS human rights machinery are succinct but important additions. As several contributors suggest, our own responsibility, the responsibilities of free media, and the legal responsibility of the U.S. Government to implement federal law barring economic or military assistance "to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights . . ."⁷ are all involved.

JORDAN J. PAUST

Unperfected Treaties of the United States of America, 1776-1976. Edited and annotated by Christian L. Wiktor. Vol. 1, 1776-1855. Dobbs Ferry: Oceana Publications, Inc., 1976. Pp. xxxix, 484. Index. \$40 per volume.

This is the first of a series of five or six volumes of a compilation of the texts of treaties which have been signed for the United States, or have been submitted to the Senate, but which, for one reason or another, failed to enter into force for the United States. The compilation will cover the period 1776 to July 4, 1976.

The arrangement of the texts in the present volume is chronological by date of signature. The author indicates in his introduction that this arrangement will be followed in the entire compilation except for multilateral treaties, the order for which will be that used by official publications, if available.

The texts are reproduced in each of the languages in which they were signed except where the foreign language text is not available or is available only in handwriting. Where the signed original of the treaty does not include a text in English, a rare occurrence, an English translation is included.

Preceding the text of each treaty is the name of the country or countries with which the treaty was signed and a short title, followed by the place and date of signature, the date submitted to the Senate and the action taken, its location in the treaty file in the National Archives, and sources of the printed text. The *Note* which follows gives information on: (a) the transmittal of the treaty to the Senate and the Senate and Executive action taken; (b) its status or reason for failure to enter into force, if known;

⁷ *Id.* at 155. Since the printing of this work, the U.S. Department of State prepared a report on human rights violations by foreign governments receiving U.S. aid, including Paraguay. See N.Y. Times, Jan. 2, 1977, at 1, col. 2; *id.* Oct. 4, 1976, at 2, col. 3.

Unfortunately, the Aché Indians do not seem to have been mentioned. Moreover, Brazil and four other Latin American states responded to the report's criticism of violations of international law and publication of consistent patterns of gross violations by turning down U.S. military aid. N.Y. Times, March 12, 1977, at 1, col. 1.

(c) a brief note regarding the signed original, its language, location, and copies available; and (d) the text used in the present publication.

This compilation will make the texts of unperfected treaties of the United States readily accessible. It is an important contribution because the texts of those treaties have not heretofore been compiled and are difficult to locate. The signed texts of the earlier treaties that did not enter into force were usually printed only in a limited number for the confidential use of the Senate and were seldom printed in secondary sources. Although the majority of the signed originals of such treaties are located in the Unperfected Treaty Series in the National Archives, some are in other files of that agency or in the Senate Records; a small number have never been found but copies have been obtained and filed in the Unperfected Treaty Series.

This first volume of the extensive compilation planned reflects patient and scholarly effort by the author to publish complete and accurate texts and precise information with respect to the treaties of the United States that did not enter into force. The volume is an orderly and clear presentation of a part of the treaty history of the United States.

CHARLES I. BEVANS

Foreign Relations of the United States, 1948, Vol. V; The Near East, South Asia, and Africa. Part 1. Pp. xxiii, 532. Index. \$8.25. Part 2. Pp. xxxvi. 1197. Index. \$15.00. Washington: U.S. Government Printing Office, 1975, 1976.

Part 1 of *Foreign Relations of the United States, 1948, Volume V* covers the whole range of subjects relating to the Near East, South Asia, and Africa excepting those regarding Palestine which are reserved for the much larger Part 2.

The Palestine controversy intrudes on several subjects treated in Part 1. Reference is made to the refusal by Iraq of oil pipeline rights to any American interest. An Information Policy memorandum states that the United States had "fallen from a position of unequaled esteem, respect and honor in the Arab world to one of embittered distrust and animosity." A report from the Ambassador in Saudi Arabia refers to U.S. support for Palestinian partition as "the excessive incubus . . . in all our dealings with the Saudi Arabian Government."

Because of their oil interests, the United States and the United Kingdom were involved, along with the bordering countries, in the developing controversy over territorial rights in offshore waters in the Persian Gulf. The British wanted the granting of "sovereignty" while the United States called for "jurisdiction and control." The United States urged that the agreement should assert rights over natural resources, e.g., fisheries and oil, rather than over the shelf as a whole. The U.S. interest was not so much in the Persian Gulf itself as in setting a precedent for wider problems involving continental shelves elsewhere. By the end of the year no agreement had been reached.

U.S. military aid to Iran was only on a moderate scale because of heavy

obligations elsewhere (Berlin, Greece, Turkey, China) but the USSR sent strong notes of protest to Iran. Iran replied vigorously to charges of U.S. domination. There was fear of a Soviet invasion, to which Iran could only respond with delaying action. The United States urged Iran to submit the exchange of notes to United Nations for its information without calling for action.

The longest section in Part 1, 221 pages, deals with the participation of the United States in efforts to resolve the disputes between India and Pakistan over Kashmir and Hyderabad. The United States was in a position to exercise its good offices in an impartial manner for the maintenance of peace as no special U.S. national interests were involved.

Conflict between the military forces of India and Pakistan within Kashmir and tribal incursions from outside made that situation critical throughout the year. As a member of the UN Commission for India and Pakistan, and in diplomatic discussion with those two countries, the United States sought a settlement through the UN Security Council. The United States imposed an embargo on the sale of arms to India and Pakistan. In December, the two countries agreed that a plebiscite would decide to which of the two countries Kashmir should go.

The dispute between the independent Indian state of Hyderabad and the Government of India was a matter of less importance. Pakistan had an interest because a substantial minority of the population was Muslim and the state was ruled by Muslims. The government was unstable with communist activity in some areas. Hyderabad brought its complaint to the UN Security Council. For all practical purposes, India settled the issue by sending in armed forces which met with only token resistance. A military government was established. The U.S. position was that the best solution would be the integration of Hyderabad as a state of India. It did not favor action by the United Nations beyond leaving the Security Council seized of the issue to watch developments.

The minor importance of Africa for U.S. diplomacy in 1948 is indicated by the fact that the section on Africa contains only a cross-reference to Volume III regarding French North Africa, a note regarding an airfield in Liberia, and a policy statement on relations with the Union of South Africa which stated: "It is our policy to avoid being drawn directly into discussion of South Africa's racial problems."

1948, Volume V, Part 2 is certainly one of the most important volumes in the whole *Foreign Relations* series. It contains a massive collection of mostly previously unpublished documents covering (1) the establishment of Israel and (2) the failure to achieve any stable peace between Jews and Arabs.

The year started with the aftermath of the UN General Assembly resolution of November 29, 1947, which called for the partition of Palestine but with an economic union and special arrangements for Jerusalem. This resolution with accompanying maps is printed as an appendix to this volume. The plan offered by the United Nations was not acceptable to either Jews or Arabs. For the Jews it became a legal basis for the creation

of a Jewish state with the lands allotted to it but it was not accepted as a limit to their territorial claims. The Arabs wanted a unified country with a limitation on further Jewish immigration.

The United Kingdom had announced its determination to give up its mandate over Palestine on May 15 and with civil strife increasing some definite action to prevent chaos was urgent. On March 19 the United States proposed in the Security Council a temporary UN trusteeship "... to maintain the peace and to afford the Jews and Arabs of Palestine who must live together further opportunity to reach an agreement regarding future government of that country." Such a trusteeship was to be "without prejudice ... to the character of the eventual political settlement." A press statement released by President Truman on March 25 declared that: "Unfortunately it has become clear that the partition plan cannot be carried out at this time by peaceful means" and that the United States was prepared to "lend every appropriate assistance" in support of a temporary UN trusteeship. As the date for British withdrawal approached, diplomatic activity was intense but the time came with no UN action decided upon.

On May 12 at a White House conference with the President, Secretary of State Marshall, Under Secretary Lovett, and others, Presidential Advisor Clark Clifford urged prompt recognition of the Israel State as soon as the British Mandate ended. Lovett and Marshall strongly objected. Marshall told Truman that "... if the President was to follow Mr. Clifford's advice and if in the elections I were to vote, I would vote against the President." President Truman apparently accepted Marshall's position and initialed a draft resolution and underlying position paper for action at the United Nations to secure a truce in Palestine and to appoint a UN Commissioner for Palestine to use his good offices with local and community authorities to arrange for operation of common services, to assure protection of Holy Places, and to promote agreement on the future government of Palestine. The time set for the end of the British Mandate was 6:00 p.m. May 14 (Washington time), and promptly at that hour the independent State of Israel was proclaimed, effective at 6:01. At 6:11 President Truman announced recognition of the Provisional Government "... as the *de facto* authority of the new State of Israel." The Department of State was informed about 5:40 and the U.S. delegation at the United Nations was caught unaware during an Assembly debate on Palestine. On May 17 Secretary Marshall told President Truman that "... the United States had hit its all-time low before the UN." On May 19 in a telegram to the Department of State Warren Austen, head of the U.S. Delegation at the United Nations, stated that recognition of Israel "... has deeply undermined the confidence of other delegations in our integrity. ... " (On May 18 the Soviet press carried the text of a note conveying Soviet recognition of Israel. The United Kingdom did not extend recognition.)

On May 14 the UN Assembly passed a resolution for the appointment of a Mediator and Count Bernadotte was appointed to the position. His assignment was to secure a truce and then to bring about a definite settlement between the Jews and Arabs.

Intermittent fighting between Arabs and Jews continued throughout the year. Twice cease-fires were obtained but even in times of truce there was some fighting. In 1947 the United Nations had declared an arms embargo for the Near East and the U.S. complied, but arms for the Jewish forces were supplied, mostly from Czechoslovakia, obviously with the approval of the USSR. The Jewish forces were better armed than the Arabs. There were terrorist actions, notably the attack of April 9 on the village of Deir Yasin by the Irgun and Stern Gang in which 250 Arabs were killed, of whom half were women and children.

In American and British diplomatic circles it was felt that united support of the two countries behind settlement proposals by Bernadotte were necessary for the establishment of real peace in Palestine and serious efforts were made to restore unity of policy between the two governments.

The plan Bernadotte drew up proposed a change of boundaries from those of the November 29, 1947 UN resolution, giving Israel the western part of Galilee which the Jews had occupied but compensating the Arabs with the Negev which was in their possession. His plan called for a special status for Jerusalem and for the right of refugees either to return to their homes or to be compensated for loss of property.

The Bernadotte plan was undermined by pro-Israel statements during the heated presidential campaign between Truman and Dewey. Truman declared that changes in the boundaries of the November 29, 1947, UN resolution should be made only if fully acceptable to Israel. After Truman's election the Department of State was able to modify this position. In a telegram to London on December 1, the United States stated that if Israel desired additional territory, *e.g.*, Western Galilee and Jaffa, it should release part of Negev to Arab states.

The year ended with reports that Israeli troops had entered Egyptian territory. The United States filed a protest with Israel.

The increasing number of refugees was a serious problem. By August Count Bernadotte said the condition of 300,000 to 400,000 Arab refugees was appalling. On October 14, Dr. Bunche (who became the Acting Mediator after Bernadotte was killed) estimated the number at 468,000. By the end of the year the latest estimates received by the Department of State were 535,000 to 655,000 in Palestine, Transjordan, and Syria, with 90,000 in Lebanon and a few thousand in Iraq, Egypt, and Israel.

A feature of American diplomacy regarding Palestine running through the year was the evident lack of close understanding between President Truman and the Department of State, including Secretary of State Marshall. As decisions for definite action were taken, they were cleared with the President, but apparently he was not in close consultation while policy was being evolved. The implications of actions taken may not have been clearly understood. From political advisers, especially Clark Clifford, Truman was receiving very different views from those of the Department of State. The record shows clearly the need for better understanding between the President and the Department of State than existed regarding Palestine.

E. R. PERKINS

Les nouvelles conventions de La Haye: leur application par les juges nationaux. Edited by Mathilde Sumampouw for the Institut Inter-universitaire de Droit International: T. M. C. Asser Institut. Leiden: A. W. Sijthoff, 1976. Pp. xx, 358. With October 1976 Supplement. Pp. 24.

This work is on the twenty or more conventions which the Hague Conference on Private International Law has produced since the end of the Second World War. In three parts, it offers summaries of decisions on the conventions rendered by courts in convention countries, gives the status—signatures and ratifications (including reservations)—of the conventions, and has a comprehensive bibliography of writings on them. The producer of the volume is the Inter-University Institute of International Law located at The Hague which carries the name of the originator and president of the early Hague Conferences, the famous Dutch jurist, T. M. C. Asser. The Institute was formed by the Dutch universities in 1965 for work in the international law field. For the "status" and "bibliography" parts, the Institute had assistance from the Permanent Bureau of the Hague Conference.

One of the major projects of the Asser Institute is the creation and maintenance of a file of court decisions in the private international law field. For foreign materials, reliance is placed on correspondents abroad, primarily academic institutions working in the same field. At the suggestion of the late Louis de Winter, president of the 1966, 1968, and 1972 sessions of the Hague Conference, publication of the decisions involving the Hague Conventions was agreed on. Under the title of the volume under review, a pamphlet edition with some 125 decisions and a bibliography was brought out by the Institute in 1970. A supplement, published in 1972 with 175 further decisions, also gave data on the status of the Hague Conventions, including information on reservations, declarations, and designations of authorities made by ratifying governments. Complaints about the unavailability of this important additional information had been constant.

The present bound volume is a second, revised edition of the earlier prints with new material up to 1974-75. Together with the October 1976 supplement, the work has reports on about 400 decisions on postwar Hague Conventions, including a number of unreported lower Dutch court decisions. The high number of judicial adjudications surprises and disturbs. Aside from some decisions involving the Guardianship Convention, almost all collected decisions are on one or the other of the two Conventions on Maintenance for Minors prepared in 1956 ("choice of applicable law" and "recognition of maintenance decrees"). Opposite results have been reached by courts in different countries on a number of points. The text of the Conventions is hardly perfect. When, at the 1972 session of the Hague Conference, two new conventions on maintenance were prepared, this time without limitation to minors, the available judicial determinations were duly considered. This produced a practical demonstration of the value of availability of a collection of court decisions.

The chances of uniform interpretation of international conventions de-

pend to a large extent upon knowledge of decisions rendered in convention countries. The Asser Institute now undertakes for the Hague Conventions what the International Institute for the Unification of Private Law has for some time been doing for other conventions, including those in the transportation field, the Geneva Conventions on Bills of Exchange and Checks, and the New York Convention on the Recognition and Enforcement of Arbitral Awards first in the *Yearbook* and now in the *Uniform Law Review*. The members of the Hague Conference have a stake in the success of the Asser Institute project.

As a member of the Hague Conference since 1964, the United States has so far ratified two Conventions, one being the Convention on Service Abroad of Documents. In this volume, the "Reports" part on this Convention has summaries in French of two decisions rendered in 1972¹ and 1973,² respectively, in California by intermediate state courts. While the Convention was noticed judicially, the issues were not adjudicated on the basis of the Convention.

The "Reports" part which covers two-thirds of the volume groups the decisions according to Conventions and arranges them around the substantive issues dealt with; a sophisticated classification system is applied. The presentation is made with great skill. This part is excellent, but the same cannot be said of the entire volume. A suitable preface, as in the original pamphlet, is missing. The identification of the contents on the title page is too narrow. Because of their practical value, the "Status" and "Bibliography" parts should have been indicated like the "Reports" part.

The decision to place the "Status" part after the "Reports," even without cross-references, does not seem to be a happy one. Knowledge about the "status" of the Convention—reservations used and declaration made—often will be necessary for understanding of a decision. Beyond that, many users will turn to the volume for the information found in the "Status" part, for example, on the local Central Authority designated for the Service of Documents Convention to receive transmittal requests. Printing of the "Status" part for each Convention ahead of the decisions would be preferable.

The Hague Conventions have since 1964 been drafted in both French and English, which are the languages used at the Conference sessions. In the "Status" part, the information is reproduced in the language used by the respective governments. The exclusive use of French in the "Reports" part is puzzling. Will decisions from areas not yet reported, such as the United Kingdom, Scandinavia, Japan, and Israel, also be translated into French? The approach used by the Hague Conference seems to suggest itself.

The value to the members of the Hague Conference of a volume as

¹*Julen v. Larson*, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (2d Dist. 1972) (service from Switzerland made in German language).

²*Shoei Kako Co., Ltd. v. Superior Court*, San Francisco 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1st Dist. 1973) (service made in Japan by registered mail with return receipt).

conceived by the Asser Institute is clear. With their own know-how, the local correspondents are in position to make an important contribution to the success of the project. Further volumes are planned. A suggestion from the reviewer is that the text of the Conventions be carried in the next volume. Only then will the set have been made self-contained.

KURT H. NADELMANN

The British Year Book of International Law, 1972-73. Edited by Sir Humphrey Waldock and R. Y. Jennings. London: Oxford University Press, 1975. Pp. xxx, 567. Index. £30.

The leading article by Miss A. L. W. Munkman in this volume of the *British Year Book* is a poignant reminder of what a promising career was cut short by her death in 1972. An examination of a number of 20th century arbitral and judicial decisions dealing with sovereignty over land and sea areas leads her to the conclusion that tribunals employ criteria that they are not expressly authorized to apply under the terms whereby the cases are submitted to third-party settlement. Links of an administrative, geographical, social, and economic character are taken into account, and sovereignty is determined according to the preponderance of those links. She rightly calls attention to the fact that precise legal rules do not work in this area and arrives at the interesting conclusion that "criteria" or "considerations" rather than "rules" govern the attribution of competences in general (as in jurisdiction in civil and criminal matters and in matters of nationality).

In the other extensive study in this volume, Dr. Akehurst takes a somewhat more rule-oriented approach to "Jurisdiction in International Law" than Miss Munkman might have approved of. His study, which is actually a short monograph, is worthy to stand beside Dr. F. A. Mann's "The Doctrine of Jurisdiction in International Law," which first appeared in the *Hague Recueil* for 1964. There can be no higher praise.

The request of Greece for the indication of interim measures of protection in the case against Turkey concerning the continental shelf in the Aegean points up the relevance of Dr. Mendelson's analysis of "Interim Measures of Protection in Cases of Contested Jurisdiction." The International Court of Justice had not laid out a wholly consistent line of decisions on such questions, and Dr. Mendelson suggests that "a flexible approach, in which all relevant factors are taken into consideration and given their proper weight" would in any event be preferable to a hard-and-fast rule (p. 322). The Court declined to indicate interim measures in the *Aegean Sea Continental Shelf* case, and only the separate opinions have contributed to the further development of the law in this area.

Dr. Mann's "Statutes and the Conflict of Laws," concerned as it is with various technical points of English law, will probably be of principal interest to English lawyers. "The Content of the Rule against Abuse of Rights in International Law" by Dr. G. D. S. Taylor deals with a topic which seldom fails to excite the apathy of common lawyers. He concludes

that "no person may, under international law, exercise a power for a reason, actual or inferred, which is contrary to the purpose or purposes for which international law contemplates the power will be used" (p. 352).

The notes are of varying degrees of interest. Two on the law of the sea—on the history of hot pursuit by *Miss Maidment* and on low-tide elevations and straight baselines by Dr. Marston—are timely and have the further virtue of not having been overtaken by the texts prepared at the Law of the Sea Conference.

The volume is prefaced by two appreciations of the late Wilfred Jenks, contributed by the Editors and by Dr. Felice Morgenstern.

HENRY W. VAN DEVENTER

BRIEFER NOTICES

Conflict of Laws: International and Interstate. Selected Essays. By Kurt H. Nadelmann. (The Hague: Nijhoff, 1972. Pp. xxiv, 401. Gld. 59.) It is late for the *Journal* to review now a book published in 1972, but the timeless quality of many of these essays and the longtime accomplishments of Dr. Nadelmann impel us to take note of this volume. In it three of his Harvard Law School colleagues, Professors David F. Cavers, Arthur T. von Mehren, and Donald T. Trautman, have republished fifteen of Nadelmann's articles dealing with various aspects of private international law. They join in a Foreword, while Cavers gives a brief biography of the distinguished scholar, and von Mehren discusses his principal writings; the volume concludes with a bibliographical appendix of Nadelmann's writings.

Among the German scholars who came to America because of the rise of the Nazi regime, Kurt Nadelmann has been one of the outstanding figures in private international law. Born in 1900, he took his doctorate at Freiburg and served as a German judge, specializing in bankruptcy cases. In 1933 he fled to France and became a French lawyer. In 1941 he came to the United States, where he has been associated with the law schools of Pennsylvania, New York University, and Harvard, teaching and engaging in research. It was this reviewer's good fortune to serve with him on the University of Pennsylvania law faculty in 1947-48, and to have been able to count him as a friend ever since.

The articles here reprinted deal with a variety of topics in the history of American conflict of laws, in problems of treaties and uniform legislation as the better means of harmonizing conflict of laws rules, in questions of court jurisdiction and the effect to be given foreign judgments, in international bankruptcy matters, and in the comparative law of dissenting opinions—whether they should be permitted as a normal part of a court's product (as in common-law countries, and the International Court of Justice), or prohibited, as in various European courts. Selected from a far larger number of publications, the reprinted articles appeared between 1944 and 1970 in several American and foreign legal journals.

These articles serve well to give us a "sampling" of the work and thought of a legal scholar familiar with both European and American approaches to private international law problems. Reading, or rereading, them should stimulate younger scholars to investigate some of these questions of private international law, which in the United States are too often left for special-

ists in American interstate conflict of laws, who may frequently lack familiarity with the broader international law field. The American Society of International Law is fortunate to number Kurt H. Nadelmann among our members. Despite the increasing number of private legal practitioners among our ranks, our Society and our *Journal* have given greater emphasis to public international law. We may hope that Dr. Nadelmann's example and this volume may remind us of our need to concern ourselves with the private as well as the public aspects of international law.

WM. W. BISHOP, JR.

The Legal Aspects of the Namibian Dispute. By Itsejuwa Sagay. (Ile Ife: University of Ife Press, 1976. Pp. xxxli, 402. Index. £8.50; \$19.00. Since 1971, the year of the sixth and final appearance of the Namibian issue before the International Court of Justice, a number of books have been published on this protracted dispute. These writings, including that of the reviewer, have shown a common preoccupation with the behavior of the International Court of Justice and its members in respect of the Namibian issue. Inevitably legal analysis has been neglected in the process. Dr. Sagay does not fall into this trap. Instead his study focuses attention on a number of legal problems fundamental to the Namibian issue which, at the same time, have wider implications for international law.

The powers of the United Nations feature prominently in Dr. Sagay's work. The source of the General Assembly's authority to terminate the mandate for South West Africa with binding effect in Resolution 2145 (XXI) has troubled many international lawyers, whose doubts have not been dispelled by the uncertain reasoning of the International Court of Justice in its 1971 Namibia Opinion.¹ Dr. Sagay argues, with reference to a wide variety of precedents, that the General Assembly may derive the power to adopt resolutions with full binding force from sources outside the Charter and that the Assembly derived such a power from a number of instruments governing the mandate system. Although this view has been advanced previously, Dr. Sagay's careful analysis of the relevant constitutive instruments and their judicial interpretation and his skilful use of precedent adds a new persuasiveness to the argument. The same approach characterizes the author's handling of the powers of the UN Council for Namibia and, although this study predates the controversial Decree on the Natural Resources of Namibia issued by the Council in 1974, it provides a convincing legal justification for this Decree. General concepts of international law fall under the same searching analysis: the doctrine of non-recognition is exhaustively examined in support of the majority opinion of 1971 and in refutation of the Dissenting Opinions of Judges Petró and Onyeama; the illegality of racial discrimination under international law is considered in the light of the 1966 *South West Africa* cases and apartheid practices; and the right of self-defense is studied in relation to the right of liberation movements to use force against the South African administration.

The above are but a sample of the "legal aspects" examined in this study, which covers the full history of the Namibian dispute up to 1973. The study is arranged in chronological order with history and modern interpretations fully integrated in a highly satisfactory manner which gives equal weight to both historical perspective and legal analysis. Dr. Sagay's book emphasizes the Namibian issue's contribution to the development of international jurisprudence and ranks as an important addition to the scholarly writings on Namibia.

JOHN DUGARD

¹On this uncertainty, see Judge Dillard's Separate Opinion, [1971] ICJ REP. 164.

Survey of Current Developments in International Environmental Law. By Alexandre-Charles Kiss. (Morges, Switzerland: International Union for Conservation of Nature and Natural Resources, 1976. Pp. 140. Index). In the rapidly developing area of international environmental law, agreement on vague principles and nonbinding resolutions and drafts are supplemented by detailed international conventions, practices reflecting convictions of legal obligation, and national laws and practices evidencing acceptance of general principles. Professor Kiss (Strasbourg) has pulled together an extraordinary amount of these data to give an overview of the current state of international environmental law.

After describing the need for international regulation of the use of the environment and defining the degrees of legal persuasiveness of various types of action and pronouncements by international organizations or states, Kiss analyzes the general international law relating to the environment. He addresses particularly the *Trail Smelter* and *Lake Lanoux* arbitrations and the procedures under various treaties whereby individuals may present claims for environmental injury. A survey of existing agreed principles and regulations follows, divided substantively into sections on pollution of rivers and lakes, the air, the sea, and wildlife protection. The concluding chapter contains observations on the need for coordinating the activities of the many international organizations concerned with environmental matters. A chronological listing of 112 environmental protection treaties from 1885 to 1976 and a rather cursory index conclude the book.

There are some surprising omissions. The *Corfu Channel* case is not mentioned either for its emphasis on principle (*sic utere tuo ut alienum non laedas*) or its implications regarding the obligation to inform other states of environmentally harmful activities which, he notes, failed to be adopted in principle by the 1972 Stockholm Conference. There is no mention of the Helsinki Rules of 1966 of the International Law Association or, indeed, of "equitable utilization" in the section on rivers and lakes. In general, Kiss seems to take the view that the 1972 Stockholm Declaration superseded most "soft law" (Kiss's term) relating to the environment, a position that is defensible but not necessarily taken by all.

In sum, this compact survey is an excellent introduction to the current complexities of international environmental law for those with immediate needs and little time. It does not purport to be a deep or scholarly treatise and cannot be considered a short course for serious students of environmental law.

ALFRED P. RUBIN

The Economic Superpowers and the Environment. The United States, The Soviet Union, and Japan. (San Francisco: W. H. Freeman and Co., 1976. Pp. ix, 335. Index. \$11.95, cloth; \$5.95, paper.) In this thoughtful and useful comparative study, three social scientists examine environmental problems and policies in their cultural, historical, political, and economic setting in the United States, the Soviet Union, and Japan. For each nation-state the scope and nature of the "problem" is outlined: energy consumption, population growth, air, water, radioactive and noise pollution, solid wastes, and ecosystem deterioration. The "awareness" of the problem is considered for each society together with the political mechanisms available and being used within them to cope with it. Active programs and approaches are summarized and contrasted. Their broad findings are fascinating: obvious differences among the three nations turn out to be poor indicators of the proclivity toward environmental destruction or the

likelihood of government action, whereas ideologies and cultural values, though highly dissimilar, have had analogous roles in furthering industrial development or in obstructing policies for environmental protection. These conclusions and others are elaborated within an extensive data base which international lawyers concerned with the environment will find challenging, even though the book has little to say about the international legal side of its subject.

W. E. BUTLER

The Fund Agreement in the Courts. Parts VIII-XI. By Joseph Gold. (Washington: International Monetary Fund, 1976. Pp. xvii, 121.) The publication of this book by the General Counsel and Director of the Legal Department of the International Monetary Fund (IMF) provides a suitable opportunity to apprise readers of this *Journal* not only of its merits, but of those of its lineal predecessor, Gold's 1962 book¹ dealing with the same subject matter. These books constitute useful compilations and perceptive analyses of cases adjudicated in many countries. Each part was originally published in *Staff Papers*,² a journal published by the IMF. In their present form, the articles are more readily accessible to lawyers and to those interested in legal aspects of international monetary matters. These books dealing with the case law arising under or affected by the Fund Agreement can be useful to persons with a general interest in international law, as well as to specialists in international law.

Each part of the books consists of an exposition of judicial decisions given by national tribunals on issues and questions currently affected by the efforts of the IMF to regulate international monetary affairs. The Articles of Agreement of the IMF, an instrument to regulate economic affairs, have an impact on law and on legal relationships which have not attracted a proper measure of attention. In his presentation of these cases and in his comments upon them, Gold puts these decisions in context. He deals not only with the references to IMF Articles, but also makes clear the legal consequences of the Fund's activities for such legal instruments as bills of exchange, checks, notes, etc. The cases he comments upon fall into two general categories: those where the cause of action is governed by the Articles of Agreement of the IMF and those in which the Articles of Agreement require a "change in public policy."

The twenty-two principal cases discussed in the book under review arose in nine jurisdictions: Brazil (1), England (1), the European Court of Justice (1), the Federal Republic of Germany (6), France (2), the Netherlands (2), Philippines (2), the United States (6), and Venezuela (1). The topics covered are: Unenforceability of Certain Exchange Contracts; Exchange Surrender Requirements; Multiple Rates of Exchange; Privileges and Immunities (of the IMF); Judicial Application of Exchange Rates; Multiple Rates of Exchange and Countervailing Duties; Exchange Control and Nationalization; Exchange Control and Act of State; What Is a "Devaluation?"; Narrow Margins and Gold Value.

Gold has made a valuable contribution to international legal literature. His book blends judicial decisions and scholarly commentaries pertinent to the Articles of Agreement of the IMF. As such they constitute an im-

¹ THE FUND AGREEMENT IN THE COURTS, *Parts I-VII*. Washington: International Monetary Fund, 1962. Reviewed in 57 AJIL 961 (1963).

² Part XII, which deals with more recent cases, appears in 4 STAFF PAPERS 193 (March 1977).

portant source of transnational law, in the sense in which Philip Jessup used the term. Those who read Gold's book with admiration and benefit from his scholarship will look forward to later articles compiled in book form which will aid students and practitioners of international law in dealing with the legal consequences of the Second Amendment to the Articles of Agreement of the Fund.

GENE WEBB

The Impact of International Labour Conventions and Recommendations. (Geneva: International Labour Office, 1976. Pp. vi, 104.) Setting labor standards has always been an important activity of the International Labor Organization, and this short volume, published by the ILO, presents evidence of that. It is primarily a study of the means rather than the motives of the organization. One important implication of the study is that these methods may serve a purpose beyond their immediate objective by furthering the development of international law.

The promulgation of universal labor standards was conceived as the ILO's principal means of action when the organization was founded in 1919. As its functions have expanded, so too have its methods, yet standard-setting remains a central part of the ILO's work. More than 150 Conventions and as many Recommendations have been adopted by the International Labor Conference. Some seek to guarantee basic human rights, such as freedom of association and equal employment opportunity. Others are concerned with general conditions of employment and the treatment of workers. Through the widening scope of its standard-setting activities, the ILO has fashioned from its specific proposals a broad outline for social action. Ratification is the formal means for implementing ILO Conventions. Yet informal compliance is just as important, for it helps create norms of international conduct. Standard-setting by the ILO thus serves not only the specific aim of improving the quality of working life, but the more general goal of strengthening international law.

DAVID A. MORSE

The Future of the United States Multinational Corporation. Edited by Lee D. Unterman and Christine W. Swent. (Charlottesville: University Press of Virginia, 1975. Pp. x, 161. Index. \$12.50). This small volume, containing the papers and some of the colloquy of a forum held in 1974, demonstrates the apparent paradox of the multinational corporation in recent years: so much has changed; so little has changed. On the "so much" side, are the completion of the report of the UN "Eminent Persons," mentioned by Dr. N.T. Wang in his paper; the adoption of resolutions establishing the UN Commission on Transnational Corporations and the UN Centre; two sessions (as of March 1977) of the Commission and one of its Working Group on a Code of Conduct; and an outpouring of excellent documentation and analyses by the Centre. Moreover, the Organisation for Economic Co-operation and Development (OECD) adopted decisions on National Treatment, on Incentives and Disincentives, and on "Guidelines" for the conduct of the corporations. And the term "multinational," which was beginning to lose favor in 1974, has definitively been supplanted by "transnational." Yet, the papers in the slim volume deal—and do so very well—with the basic issues which still preoccupy the United Nations, the OECD, and numerous private forums. The discussion is as relevant today as it was when these papers were written and in many cases the papers are vastly more thoughtful than those of more recent (and

politicized) vintage. The book leaves out little that is relevant to current debate, and the quality of the papers is high.

The volume follows a more or less standard organization: an excellent analysis from the viewpoint of the U.S. Congress by then Representative (now Senator) Barber Conable, followed by sections on the TNC as it is perceived by the home country (mainly the United States) and by the host country (the developing nations in this case), with a concluding section on regulation. A broad spectrum of points of view is presented, with critics and proponents fairly represented. Excellent pieces by Francisco Orrego Vicuña of Chile and N. T. Wang, now with the UN Centre on Transnational Corporations, put the issue of the TNC in the proper perspective of international economic relations. Orrego Vicuña makes the interesting analogy between the recognized validity of distributive justice within a nation and the relevance of such a goal to an increasingly interrelated world. The AFL-CIO point of view is competently put forward by Andrew Biemiller and the viewpoint of the socially conscious industrialist by several persons. On the prospects of regulation, none of the writers (including the author of this book note) exhibit overwhelming enthusiasm for international regulation, largely on the ground of the difficulty of determining objectives and regulatory mechanisms.

SEYMOUR J. RUBIN

Competition Policy in the UK and EEC. Edited by Kenneth D. George and Caroline Joll. (New York: Cambridge University Press, 1975. Pp. 220. Index. \$19.95.) This book contains six papers presented at a Social Science Research Council Conference on "competition policy in the EEC," held at Somerville College, Oxford, from September 23-25, 1974, plus two chapters by the editors which were prepared especially for publication. The eight chapters discuss the legal framework for a competition policy in the UK and EEC; EEC competition policy towards mergers; British merger policy; abuse of dominant position and changing European industrial structure; policies towards market power and price discrimination in the UK and the EEC; competition laws which apply to member states; and a review of the main economic issues raised by the preceding papers.

Although the keynote speaker at the conference stated that the conference would "be devoting much of its time to considering the relationship between national and European community action in the competition field" (p. 2), for all practical purposes this relationship was viewed from the perspective of the relationship between the law of the UK and that of the EEC. Only an incidental reference was made to the law of the Federal Republic of Germany in a more general discussion of the EEC policy towards mergers (pp. 72-76). In fact one commentator, in making the suggestion that all EEC member states should be urged to adopt the EEC Commission's approach in their national legislation, queried "whether it is simply coincidental that we have no French and Italian colleagues with us today?" (p. 127). On the other hand both the UK and the EEC experience and policies were frequently compared with those of the United States.

The four papers devoted exclusively to EEC subjects were more descriptive and less analytical or critical than were the two papers which discussed UK law. One senses that the former were lectures and the latter were arguments designed to influence policy. The opening chapter by the editors

on the legal framework provides an extremely useful account of the formal institutional development in the UK and the EEC, while their final chapter containing a review of the main economic issues ties together into a more coherent whole what would otherwise have remained a series of six papers on related subjects.

The book does not present many ideas which have not already been written about extensively. However, it does serve to focus attention on the problems of coordinating the competition policies of the EEC with the competition policies of one particular member state that has begun with substantially different premises and goals.

ERIC E. BERGSTEN

KSZE. Konferenz über Sicherheit und Zusammenarbeit in Europa in Beiträgen und Dokumenten aus dem Europa-Archiv. Edited by Hermann Volle and Wolfgang Wagner. (Bonn: Verlag für Internationale Politik GmbH, 1976. Pp. xii, 339.) This is a voluminous collection of the pre- and post-Helsinki documents, preceded by a number of selected pre- and post-Helsinki articles which had appeared in the *Europa-Archiv*. It is thus a reference work intended, as the editors point out in their preface, to help diplomats, officials, research workers, etc., concerned with post-Helsinki developments. As such, it may indeed provide a useful tool for future activities or research. Its immediate relevance seems to the reviewer open to doubt. The semantic exercises of the Final Act of truly Brobdingnagian proportions¹ are only slightly less indigestible than the unending series of governmental declarations both preceding and following the Act. As against this tower of Babel, the Swiss draft convention for pacific settlement of international disputes, with its clear and businesslike language, stands out as a monument of sanity, as does the commentary on it by Professor Bindschedler, its chief architect. These are, however, reflections which, overstepping the limits of a book review, bear directly on the Helsinki venture whose ultimate impact on Europe and the Europeans may yet turn out to be something very different from what had been intended.

KRYSTYNA MAREK

Le Guerre di Liberazione Nazionale e il Diritto Internazionale. By Natalino Ronzitti. (Pisa: Pacini Editore, 1974. Pp. 215. Index. L. 3,500.) Among the various studies recently devoted to wars of national liberation, this book is of special interest. It is not focused on the question whether these wars should be regarded as international or noninternational armed conflicts, but aims to find an adequate definition of the phenomenon autonomously relevant to the international legal order. To this effect, the author analyzes the different meanings of the concept of wars of national liberation, excluding those pertaining to conflicts between states and mere civil wars. In his opinion, two basic factors come into consideration in defining wars of national liberation: the nature of the parties to the armed conflict, *i.e.*, a nonstate community struggling against the incumbent government, and the aim of the conflict, consisting of the achievement of self-determination. In this perspective, the following armed conflicts fall within the definition: anticolonial struggles, struggles against racist regimes, and struggles against nonrepresentative governments as defined in the Declaration on Friendly Relations among States (pp. 38-56).

¹ The reviewer is indebted for the Gulliverian aspect of the problem to H. S. Russell's brilliant essay on Helsinki in 70 AJIL 242 (1976).

In the following chapters, the author investigates the legitimacy of the use of force by the government in power against national liberation movements and concludes that it is prohibited by a recently emerged international law rule, different from that established in Article 2(4) of the Charter of the United Nations (p. 72 ff.). He then analyzes the legal position of third states with regard to a war of national liberation (pp. 108-52) and the applicability of the laws of war to the relations between a government in power and liberation movements, with particular reference to the status of freedom fighters as legitimate belligerents (pp. 198-206).

The views expressed by the author are stimulating and well grounded on a careful reconstruction of international practice. His book is a noteworthy contribution to an important and controversial subject of great interest to international lawyers.

FAUSTO POCAR

The "Greek Case" before the Council of Europe: The Exercise of "Political Pressure" by International Organizations: Theory and Practice. (In Greek) By Dimitris C. Conostas. (Athens: Papazisis Publishing House, 1976. Pp. 244). The central aim of this study is to assess the ability of international organizations to influence the internal behavior of member states so as to ensure compliance with the purposes and principles of the organization. The author attempts to draw some general conclusions from such an assessment by examining a specific case brought before the appropriate organs of one such organization—that of Greece before the Council of Europe. The "Greek Case" arose because the overthrow of Greece's parliamentary government in 1967, the establishment of a military dictatorship, and the declaration of a "state of seige" stood in violation of the very principles (human rights and fundamental freedoms) whose acceptance was the condition for membership in the organization. Although the analysis concentrates on the measures adopted by the appropriate organs of the Council, the study goes beyond their strictly legal implications to examine the effects generated by the case within the Council and the resultant "political pressure" brought to bear against the delinquent state in order to ensure compliance.

The value of this work lies more in its specific examination of the "Greek Case" and its consequences for the Council and the Greek regime, than in any attempts to generalize from it. The "Greek Case," as the author is well aware, was unique even from the perspective of the Council, where the institutional protection of human rights is highly developed. It was the first case in which human rights were violated as an "administrative practice" and on a massive scale by a member state. Greece's refusal to arrive at a "friendly settlement" led to the implementation for the first time of all the steps contemplated by the Convention on Human Rights, *viz.*, publication of the Commission's Report along with corrective recommendations. Finally, the case gave the Council the opportunity to take all steps to protect its interests. Greece's inevitable expulsion from that body was preempted only by its timely "voluntary withdrawal." This affirmation of the Council's principles cannot but strengthen its institutions against future violations. Although in the "Greek Case" the "political pressure" exerted did not lead to the restoration of political freedoms, it did play a role in "restraining" the internal policies of the regime.

Another noteworthy aspect of this work is its briefer examination of the policies of the same states in other organizations, such as NATO, which conflicted with their stand in the Council of Europe. Their obvious re-

luctance to press the matter within NATO was influenced by American opposition (also felt in the Council of Europe) and the recognition that their own security interests might be jeopardized by Greece's alienation from NATO. By contrasting their conflicting policies and referring to their bilateral economic relations with Greece (business as usual), Mr. Conostas indirectly defines the limits beyond which those states could not have gone in pressing the issue of human rights. And that in itself sets limits to the ability of any organization to exert "political pressure" in order to influence the internal policies of its members.

MARIOS L. EVRIVIADES

Die Staatsordnung der Sowjetunion. Translation from the Russian and Introduction by Herwig Roggemann. (Berlin: Berlin Verlag, 1973. Pp. 326. Index. DM 25.) *Die Staatsordnung der DDR. Zweite erneuerte und erweiterte Auflage.* Editor and contributor Herwig Roggemann. (Berlin: Berlin Verlag, 1974. Pp. 430. Index. DM 28.) *Die Staatsordnung der Volksrepublik Polen.* Compiled by Herwig Roggemann. (Berlin: Berlin Verlag, 1974. Pp. 390. Index. DM 30.) These three compact volumes are designed as teaching manuals for use by students of East European legal and constitutional systems. They follow a uniform pattern with sections on: the Party constitution; the State Constitution; legislative procedure; central state organs (administration); local state administration; elections (and deputies); and legal protection of citizens (including administrative procedure). The chapters consist of concise, but quite comprehensive, essays, accompanied by translations of the texts of key pieces of legislation applicable to each area.

The emphasis throughout is on the formal system of government in the countries concerned, *i.e.*, on the statutory structure of the principal components of the respective country's public (state) "order." While a certain amount of historical background is included in order to provide a better perspective, the focus is on the current status of the national mechanism of political rule. A major concession to the realities of the East European scene is the inclusion of the Party in this frame of analysis in recognition of its true role in managing state affairs, regardless of what the official juridical script cares to say on the subject. Even so, the political science methodology tends to shy away here from looking strictly at the institutional chart and attempts to balance the paper record by integrating whatever social data is available on the quality of the organization's actual performance and the nature of its interrelationship with the human environment in which it must function and which it seeks to shape in accordance with the postulates of its doctrinal canon. By contrast, many, if not most, European scholars still find it possible to address themselves seriously to an evaluation of Communist regimes by scrutinizing almost exclusively the details of the legal facade.

Questions of technical approach and perception aside, however, these studies contain a great deal of accurate legal information, lucidly presented. The tone is objective, the description is fair, the citation of local and German primary and secondary sources is competent, without being exhaustive (reference to materials in other languages is rare, in deference, presumably, to student limitations). For anyone who wants a handy primer on the legal blueprint of these three states as it is allegedly designed to operate, the set is highly recommended.

GEORGE GINSBURGS

Sozialistische Wirtschaftsintegration und Ost-West-Handel im sowjetischen internationalen Recht. By Axel Lebahn. (Berlin: Duncker & Humblot, 1976. Pp. 495. Index. DM 98.) Formed in 1949 partially as a response to the Marshall Plan, the Council for Mutual Economic Assistance (COMECON, also CMEA) has undergone important evolutionary development in the intervening years. This book, in one sense, is a study of the historical process by which the socialist countries that are members of COMECON have changed the organization's focus from foreign trade promotion and cooperation in scientific and technical areas to the coordination of national economic plans. Relevant comparison is made to the concurrent development of the European Economic Community (Common Market). In addition, however, this work is a highly theoretical, analytical, and comparative study of the concept of socialist economic integration and trade relations with nonsocialist countries in relation to Soviet conceptions of international law. Commencing with an examination of the role and ideological limits of the Soviet policy of coexistence in East-West trade relations, the author proceeds to a consideration of the socialist preference for bilateral over multilateral economic relations. Thereafter the book examines the nature of multilateral organizations, dealing with such problems as provisions for new membership and termination of membership in relation to the concept of national sovereignty and economic integration called for by treaty-created multilateral organizations. Based upon these theoretical considerations, the author concludes that, while the members of COMECON are juridically independent, they are nevertheless functionally being drawn into a multilateral economic planning system administered by an increasingly centralized organization. As to East-West trade, the author envisions the continued predominance of bilateral rather than multilateral agreements and cooperation.

While an important contribution to the literature of East-West trade and regional economic integration, the work is of interest primarily to the specialist in regional economic integration or, more accurately, to the scholar interested in international economic organizations the membership of which transcends ideological boundaries. The book contains an exhaustive bibliography of the legal, economic, and political literature (primarily German) relating to Soviet foreign trade, East-West trade, and economic integration in socialist countries.

DON BERGER

El proceso de integración en América Latina en 1975. (Buenos Aires: Instituto para la Integración de América Latina (INTAL), 1976. Pp. xii, 321.) This work, the 1975 report of the Institute for Latin American Integration (INTAL), contains an analysis of the progress of regional integration. Concerning the Latin American Free Trade Association (LAFTA), the conclusions show the improbability of achieving, in the short term, any substantial progress in the integration process, given the difficulties that LAFTA has to face in order to overcome the stagnation of previous years. According to the report, the Andean Pact is submerged in a political conflict which concerns the application of common rules to foreign investment and the disagreement between the protectionist view and one calling for low and moderate tariffs. Thus there is an obvious need to restate the principles and the framework that inspired the subregional model. In the Central American Common Market, even though there is the political will for integration, there are still some obstacles for the development of free trade, the application of a common external tariff, and the fiscal incentives to industrial development. On the other hand, some progress has

been made in the coordination of external economic policies in the Caribbean Community (CARICOM). The countries of the Community adopted joint positions during the negotiations with the EEC, which resulted in the Lomé Agreement.

With this work INTAL shows the importance of the institution as a wellspring of ideas and as an entity capable of establishing positions that are peculiar to Latin America. The task of INTAL is important in promoting and guiding the integration process in Latin America and in influencing the governments of the region in their decisions.

BERNARDO SEPÚLVEDA AMOR

Politics of the Indian Ocean Region. The Balances of Power. By Ferenc A. Váli. (New York: The Free Press; London: Collier Macmillan Publishers, 1976. Pp. xv, 272. Index. \$14.95.) The author has undertaken with considerable success to present an integrated treatment of his subject embracing all significantly relevant factors. The treatment is necessarily concise in view of the size of the book, the complexity of the factors being dealt with and their interrelationships, and the author's evident endeavor to bring out a monograph up-to-date at the time of publication. Its principal value may be for those desiring an acquaintance with the basic factors affecting the politics of the region and concise information concerning the foreign policies and international relations of the individual countries concerned.

The principal treatment of international law, per se, is found in subdivisions entitled, respectively, "Territorial Waters and Straits," "The Archipelago Concept," and "The Continental Shelf and Resource Jurisdiction," in a chapter on "Oil, Shipping and the Law of the Sea." Evolving concepts of the law and the attitudes of the governments principally concerned are concisely described. A substantial portion of the book is devoted to the foreign policies of individual states as they bear on the region. The states outside of the region given particular attention are the United States, the Soviet Union, China, the United Kingdom, France, Japan, and Portugal. States within the region are considered in subgroupings in chapters entitled "The Southeast" and "The Southwest" of the Indian Ocean area, "Subcontinent India and its Neighbors," "Countries of the Persian Gulf," and "The Horn of Africa and the Red Sea Countries." A selected bibliography follows each chapter, and three appendices set forth geographic and statistical information concerning the region.

JOHN W. HALDERMAN

Sea Power and the Law of the Sea. By Mark W. Janis. (Lexington, Mass. and Toronto, Canada: D. C. Heath and Co., 1976. Pp. xvii, 99. Index. \$11.) This brief essay has all the characteristics of a book except the content. It is a medium size law review article bound in hard cover and offered for sale at an outrageous price.

The discussion is brief and useful. In four terse chapters the author summarizes the naval interests of the United States, the Soviet Union, Great Britain, and France. Naval missions are identified and their effectiveness is appraised in terms of constraints arising from laws affecting transit through straits, transit along coasts, and military use of the seabed. Brief mention is made of the composition and deployment of existing naval forces. Each chapter examines the role of naval interests in national ocean policy processes (considering such interests in this context as bureaucratic

structures) and also evaluates the impact of navy concerns on the law of the sea. A fifth chapter is devoted to the interests of all other coastal states in the legal issues noted above. Chapter six discusses the effect of navies and naval interests on the development of customary law of the sea and the negotiations on the law of the sea. Chapter seven comments on the impact of the new law of the sea on the naval interests previously identified.

The main value of this publication is that it brings together summary reviews of the interests of the major naval powers and their impact on current negotiations. Past changes in naval and ocean policies and interests are given suitable emphasis but possible future changes are barely mentioned.

WILLIAM T. BURKE

International Organizations. A Guide to Information Sources. By Alexine L. Atherton. (Detroit: Gale Research Co., 1976. Pp. 350. \$18.00.) Professor Atherton's long awaited bibliographic guide provides the student of international institutions with access to a large number of works which he might otherwise have neglected. The Atherton work updates and extends Harold Johnson's and Baljit Singh's *International Organization: A Classified Bibliography*. (Unfortunately this earlier work is misidentified in the Atherton book, presumably due to a typographical error, of which there are several). The chief strengths of the Atherton work relate to its organizational format and its extensive indexes: author, title, and subject. Atherton has classified international organizations in terms of their relations with their member states and with regard to issue-areas as well as in terms of more traditional institutional characteristics.

Somewhat ironically, however, the sources of some of this book's virtues are also the sources of its vices. In an attempt to be all inclusive, Atherton has included sections on general works as well as those unique to international organization. In those sections the errors and omissions are overwhelming. For example, the revised edition of White is not mentioned (p. 16); the American Political Science Association has not chronicled doctoral dissertations in its *Review* for years in spite of what Professor Atherton lists (p. 29); *Ulrich's Periodical Directory* is frequently updated so there appears to be no rhyme or reason for the mention of the 10th edition (p. 33); the *International Index to Periodicals* has undergone two name changes since it was called what Atherton has listed on page 34; the *UN Monthly Chronicle* is now the *UN Chronicle* (*contra* p. 36), and the list goes on. This whole enterprise of including in an inadequate form what is better available elsewhere (e.g., in Sheehy's recent *Guide to Reference Works*) reaches something of a climax in Chapter Five entitled "Miscellaneous Information" and particularly in sections E, G, and H. One can not help but wonder why Professor Atherton decided to include the addresses of some 15% of the world's most important intergovernmental organizations and a single book about *Opportunities for Publishing*.

The second virtue/vice of the Atherton work relates to the time span of its information. Although published in late 1976, Atherton's work is quite "thin" regarding anything past 1973. This weakness is hardly compensated for by the "Bibliographic Essay" at the beginning of the work. Perhaps a paperback supplement to this important work is already overdue. And perhaps that supplement should be limited in scope to the area best known by the author and most needed by the discipline.

MICHAEL G. SCHECHTER

A Chronology and Fact Book of the United Nations, 1941-1976. By Waldo Chamberlin, Thomas Hovet, Jr., and Erica Hovet. (Dobbs Ferry: Oceana Publications, Inc., 1976. Pp. 302. Index. \$12.50.) This is a well-known and useful reference book for students of the United Nations. However, the usefulness of a publication of this sort depends on its accuracy and a few spot checks show that its accuracy could well be improved. The Chronology lists the establishment of the second UNEF and of UNDOF, but with no corresponding headings in the Index. There is an entry for August 31, 1956, regarding a report of the Special Committee on Peace-keeping Operations "that future peace-keeping operations . . . will be met by voluntary contributions" (pp. 59-60). This is not correct. The list of advisory opinions of the ICJ omits the *Application for Review of Judgment No. 158 of the UN Administrative Tribunal*. The names of several judges of the Court are misspelled (e.g., Zafrulla Khan becomes "Zafrulla Kahn"), several names are missing (e.g., Ammoun, Bengzon, Petrn, Onyeama), and Basdevant is wrongly listed as "1955-present" (p. 129). The *Expenses* case is listed in the Index under "Budget." It is difficult to render in a few words the gist of the opinions or judgments of the Court. But it is incomprehensible to say that in the *IMCO* case the Court advised "that failure to elect neither Liberia nor Panama . . . meant that the Committee was not properly constituted." It is correct to say colloquially that in the 1966 judgment in the *South West Africa* cases, the Court "throws out cases" but it is incorrect to continue "arguing neither Ethiopia nor Liberia have a direct interest in South West Africa" (pp. 61-62). The Court found that those two states have not established "any legal right or interest" which is a different matter. It is correct to say that in *Barcelona Traction* the Court rejected the Belgian claim (p. 72) but it is important to add that the rejection was not on merits but on lack of *jus standi*. Also it is correct that in the *Nuclear Test* cases the Court decided that the claims of Australia and New Zealand "no longer had an object" but it is incorrect to add "because France went ahead with the tests" (p. 83).

It would be well for the editors to contemplate a new and revised edition which would bring their reference book up-to-date and make it more accurate.

LEO GROSS

Year-book of World Problems and Human Potential, 1976. Compiled and published as a joint project by the Secretariats of Union of International Associations. (Brussels, 1976. Pp. 1136. \$65, B.Fr. 2,300, Fr.Fr. 270, Sw.Fr. 150, £24.) The development of cognitive maps for problem solving has a venerable history, but in our time the erstwhile encyclopedist undertakes a formidable and really unprecedented task. The grasp of complexity, the perception of interdependencies, and the sheer volume of knowledge, not to speak of the varying degrees of accessibility, are more challenging than ever before, as are the demands for precision and utility. At the same time, the political censors of the world of the mind have developed many new boundaries, secrecies, and code languages. Cybernetic techniques cannot really surmount these obstacles, but they do begin to make some of the processing manageable. Yet human minds, not computers, must ultimately use the information gleaned to formulate problems and devise solutions. Hence, as important as technological ingenuity in the gathering and processing of data is the invention of schema for portraying interrelationships and applying them to problem solving. The relevance of "Occam's razor" for complex systems is limited indeed.

The first edition of the *Year-Book of World Problems and Human Potential* is, in scope and ambition, in the tradition of Diderot. It tries to survey the interlinked networks of world problems and the concepts, skills, and information which may be available for analysis and solution. Thirteen "Information Series" are identified, several with cross references to existing information systems or series, such as the UN Standard International Trade Classification or the UN Treaty Series. Each of the thirteen series is introduced by a brief essay, explaining intention, structure, and a preliminary appraisal of results. A supplementary section includes 14 appendices which explain or defend the theory and method of the *Year-book*.

The *Year-book* may not emerge as the *vade mecum* for those who address world problems or who seek to relate their particular problems to the larger context or who require a ready survey of the resources of the global community for problem solving. Elements of the cognitive map may not be the best data available. And there is the problem of obsolescence of information. Given the rapidity of change, the very format of pasteboard permanence, even in something as transitory as a yearbook, may itself be anachronistic. Future year "books" may be cathode ray tubes with cables to a global information center in which data about the environment and the world community are updated hourly. Above all, the *Year-book* evidences the indispensability of collections of this sort for problem solving and underlines the fact that projects such as these, international in scope, must be international in their production. The *Year-book* may be praised for its ambitiousness, and the very fact that it has appeared. Its level of generality varies as does the quality of some of the entries. In tone, it lacks the high style and general optimism of its Enlightenment predecessors, but it should be viewed as a worthy addition to that proud tradition.

MICHAEL REISMAN

Annals of Air and Space Law, Vol. I, 1976. Institute of Air and Space Law. (Toronto: The Carswell Co., Ltd.; Paris: Editions A. Pedone, 1977. Pp. viii, 289.) This yearbook is a valuable addition to the periodical literature in two related and complex areas of law. Volume I here reviewed contains fifteen essays (eleven in English and four in French), three comments on work of "International Organizations," three case notes, two book reviews, and the Convention on Registration of Objects Launched into Outer Space. Many of the authors are well-known specialists; others are younger but competent scholars. The essays vary in scope and deal with a wide range of topics. The first nine are on air law and the last six on space law. Of the former, three concern recent amendments of the Warsaw Convention and other aspects of air carrier liability (by FitzGerald, Magdelénat, and Mapelli). There are surveys of the stratospheric ozone problem (by Christol), developments in the law of air warfare (by DeSausure), the Dutch-American air transport conflict (by Haanappel), "Confidentiality of Civil Aviation Information in the United Kingdom" (by Kéan), and airport user charges in Canada (by Smith). A study of air transport relations between France and francophone countries in Africa (by Monlaü) is unusual and rewarding.

The section on space law includes surveys of the evolution of Western European organizations for space activities (by Bourély) and of comparable developments in the Soviet bloc (by Vereshchetin), a challenging analysis of "The Legal Aspects of the Space Shuttle" (by Diederiks-Verschuur), a brief provocative survey of the extent of acceptance of major

space treaties (by Galloway), a plea for a truly comprehensive space law (by Mircea Mateescu Matte) and an analysis of the Convention on the Registration of Objects Launched into Outer Space (by Nicolas Mateescu Matte).

The value of the volume is but slightly impaired by occasional failures to bring information up to date and by some editorial lapses.

O. J. LISSITZYN

International Bibliography of Air Law Supplement 1972-1976. By Wybo P. Heere. (Leiden: A. W. Sijthoff, 1976. Pp. xxii, 169. Index.) When the Netherlands scholar, Wybo Heere, published his *International Bibliography of Air Law 1900-1971* in 1972, he brought together references to thousands of articles on air law published in a wide variety of languages in scores of sources. In carrying out his task Mr. Heere built up a worldwide network of informants. Hence, in preparing the supplement for the period 1972-1976, Mr. Heere was in a position not only to bring his work up to date, but also to include material from the period 1900-1971 that had been overlooked in the first volume. This happy circumstance assures the user of these unique volumes of what appears to be maximum coverage for the whole period 1900-1976.

The volume on the period 1972-1976 follows the pattern of the earlier one in covering such topics as general subjects; organizations in the field of civil aviation; the administration of national and international aviation; the aviation industry; aircraft; aviation personnel; airports and air navigation facilities; air transport; damage to third parties; accidents (towage and salvage); insurance; criminal law; acts on board aircraft; military aviation; and the laws of war and neutrality. Once more, as in the case of the first volume, the table of contents and subject index are given in English, French, and Spanish. The range of publications searched for references is comprehensive. While the table of abbreviations alone indicates that at least fifty publications have been consulted, it is evident from the references in the body of the work that many other sources have been used.

It is sad to note the demise of the *Revue Générale de l'Air et de l'Espace* after several decades of mirroring, in great detail, developments in the fields of air and space law! At the same time, it is gratifying to note that the new and the more modest Netherlands review entitled *Air Law* came into being in 1975. This publication has already established a good reputation based on its short, well-written, and topical articles. One of the prime movers of this publication is a KLM jet pilot, Aart van Wijk, who is a Doctor of Laws.

Mr. Heere is once more to be congratulated for his great contribution to air law. Without his worldwide travels and many years of patient labor, full many a flower of air law scholarship would continue to blush unseen in the pages of obscure law journals.

GERALD F. FITZGERALD

Communication via Satellite: A Vision in Retrospect. By Delbert D. Smith. (Leiden and Boston: A. W. Sijthoff, 1976. Pp. xviii, 335. Index.) The stated purpose of the present volume is to give a "retrospective technology assessment of the communication satellite" (p. ix). The author focuses upon what he identifies in key chapter headings as "the Technologic Imperative," and then sets out to chart, *seriatim*, the "responses" of various national and international bodies: the U.S. Defense Department,

the National Aeronautics and Space Administration (NASA), the Communications Satellite Corporation (COMSAT), the International Telecommunications Satellite Organization (INTELSAT), and lastly the United Nations. In fact, the main emphasis is upon the development of a U.S. telecommunication satellite policy for peaceful purposes; the formation of the U.S. national agency COMSAT; and finally, with American predominance in sophisticated space science and space engineering, the development of the international agency, INTELSAT, which was to be so largely shaped and controlled, in its formative years, by the United States because of the crucial COMSAT component within INTELSAT itself. Smith has given a very clear and concise survey of the historical development, within the United States and rather more generally in the Western World, of the peaceful utilization of telecommunication satellites.

The two main limitations of the book tend to be interrelated. It is, first, a somewhat insular "North American" study, focusing essentially on the United States and U.S. scientific-legal materials, without canvassing the quite considerable literature of other main participants in space communications, France, Germany, and the European Community as a whole, and of course, the Soviet Union. Much of this literature may not yet be available in translation from the French, German, and the Russian; but the absence of it can lead too easily to a conclusion, as being axiomatic, that there is only *one* "technologic imperative" and hence that there was only one rational way to internationalize space communications by telecommunications satellites, namely, the COMSAT-INTELSAT route taken by the United States and its main associates. Actually, the quite independent response of the Soviet Union and its Eastern European associates through the INTER-SPUTNIK organization, and the more nuanced response of the European Community to the power of the United States within INTELSAT, suggest that there is either more than one "technologic imperative"; or that different legal systems may conceptualize the problem in rather different ways and so opt for rather different solutions; or, finally, that the "technologic imperative" is made to yield in this area, as in some other areas of potential international cooperation, to other, nontechnical imperatives. The failure to follow up the principle of Soviet-Western cooperation in the peaceful uses of outer space and in space research generally (so firmly established in the Space Treaty of 1967) must remain one of the real pities of the development, to date, of satellite communications. That failure influences and clouds the attempts within the United Nations to reach East-West and general international agreement on the legal principles that should govern direct satellite broadcasting by any country or group of countries.

EDWARD McWHINNEY

International Commercial Arbitration. Vol. I: Documents and Collected Papers; Vol. II: Documents. Compiled and edited by Clive M. Schmitthoff. Vol. I: 1974-1975; Vol. II: 1976. (Dobbs Ferry: Oceana Publications. Pp. Vol. I, 463. Appendices; Vol. II, 327. \$75 per volume.) Participation in dispute settlements by the business communities in many countries, including the dealings of state-controlled bodies with foreign enterprise, increases with the extension of foreign trade. The British Institute of International and Comparative Law convened a conference in London in October 1974 where papers on the law and practice of international arbitration were presented by authorities from East and West Europe and from the United States. They dealt with general perspectives such as defective clauses, limits of arbitral jurisdiction, appeals procedures,

extraterritoriality, and the development of unification. Regional, national, and international arbitral institutions were considered in the operation of their rules. Specific topics such as investment disputes, maritime and commodity arbitrations, arbitration in oil concessions, in insurance, and in long-term business transactions were further explored. The two volumes—the second one containing documentation which has appeared since the publication of the first volume—offer a great variety of pertinent documents. The compilation thus makes source material of various kinds available in a single publication. A third volume *Cases and Regulations under the New York Convention*, compiled and edited by Giorgia Gaja, is contemplated for publication in 1978.

MARTIN DOMKE

Yearbook Commercial Arbitration. Vol. I 1976; Vol. II 1977. General Editor Pieter Sanders. (Deventer, The Netherlands: Kluwer B. V. Pp. Vol. I, xii, 254; Vol. II, xi, 282. \$12 and \$15 respectively.) The emergence of the public corporation in many countries will necessitate understanding of the means by which controversies between state entities and foreign business enterprises may be settled. Questions of international law in international trade relations, especially the application of laws other than the national law of a participating governmental agency, will have to be dealt with by arbitration tribunals. An excellent source of references to the arbitral law and practice of various countries is now being offered by the *Yearbook*. Included in Volume I are national reports by well-known experts on the European Communist countries, Cuba, and Mongolia; in the second volume are reports on Australia, Canada, India, Israel, Nigeria, South Africa, the United Kingdom, and the United States. Arbitral awards, otherwise not published, are summarized with additional notes; new arbitration rules and recent amendments to arbitration statutes (Belgium, Greece, and Sweden) are published with commentaries. Court decisions on the New York 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards are further reported and annotated. Finally, articles on recent international arbitration meetings and bibliographies on arbitration publications are included in these valuable two first volumes of the *Yearbook*. They will be followed by three further volumes (1978–1980) which will contain national reports for Latin America, Sweden, Switzerland, the oil-exporting countries, Western Europe, and the Far East. The *Yearbooks* will be an indispensable collection of material in a field of increasing importance in international economic and legal relations—the settlement of trade disputes by arbitration.

MARTIN DOMKE

The Italian Yearbook of International Law, 1975. Vol. I. (Naples: Editoriale Scientifica, 1975. Pp. xii, 403. Index. L.15,000.) International lawyers who do not read Italian easily will welcome this new yearbook, published in English, whose "main aims" are stated to be: "firstly, to spread Italian scholars' viewpoints as regards contemporary problems of international law to other countries; secondly, to make documentation pertaining to Italian international law practice more readily accessible, including the judicial decisions of major interest, diplomatic and parliamentary practice, relevant pieces of legislation, and treaties to which Italy is a party" (p. vii). The Foreword indicates that the *Yearbook* will concentrate on "public" international law (despite its close connection with private international law in Italian scholarship) and will deal only to a limited extent with "European Communities law."

The first 219 pages contain fifteen articles and notes by Italian professors on a wide variety of contemporary international law questions. Then follow sections, each arranged by subject matter, covering Italian judicial decisions, diplomatic and parliamentary practice, notes on recent Italian treaties, and a few pages on legislation. A bibliography of books and articles published in Italy in 1970-1974, six reviews of recent Italian books, and the index complete the volume. Professors Francesco Capotorti of Rome, Benedetto Conforti of Naples, and Luigi Ferrari-Bravo of Naples head the Board of Editors, which also includes Professors Antonio Cassese, Luigi Condoralli, Giorgio Gaja, Andrea Giardino, Riccardo Luzzato, Paolo Picone, Vincenzo Starace, Antonio Tizzano, and Tullio Treves.

Each reader will find some articles and materials more interesting than others; their general quality is very good. We may hope and expect that this initial yearbook will receive a widespread welcome, and that future volumes will appear regularly.

WM. W. BISHOP, JR.

Polish Yearbook of International Law, Vol. VII, 1975. (Wrocław, Warszawa, Kraków, Gdańsk: Ossolineum, for the Polish Academy of Sciences, Institute of Legal Sciences, 1976. Pp. 378.) The seventh volume of the *Polish Yearbook of International Law* follows as regards its organization and content the tradition well established by previous issues. Its articles, book reviews, and bibliography present a comprehensive picture of the movement of ideas in the Polish scholarly community concerned professionally with international law and international relations. Articles contained in the volume cover a wide spectrum of practical and theoretical questions touching upon some of the most important issues of international life, both from the regional as well as global point of view. Six articles deal with problems either concerning Poland, the region, or the Socialist Commonwealth of Nations. Specifically Polish problems are discussed in the articles of Jakubowski (The Recognition and Enforcement of Foreign Arbitration Awards in Poland), Jasica, (The Legislation of the Federal Republic of Germany in Conflict with the Polish German Treaty on Normalization of Relations between the two countries), and Kubala (Legal Regime of the Polish Frontiers). Regional questions are dealt with in the articles by Zaorski (Baltic Fisheries), Lopuski (Maritime Law of the CMEA Countries), and Klepacki (Membership and Participation of States in the Socialist Intergovernmental Organizations). These contributions are followed by subjects of general interest. Professor Bierzanek writes on the function of international courts at the present time. Morawiecki discusses with great competence the Extrajudicial Control of States by International Organizations, suggesting that this is perhaps the most effective method to assure international world order. Michalska's contribution is on human rights and the problem of universal and regional approach to their enforcement. Human rights are actively implemented in Western Europe (European Court of Human Rights), while in the socialist bloc the international approach to human rights is seen as an intervention in internal affairs, prohibited by the UN Charter. Generally, as Michalska sees it, human rights are a function of stability and democracy in society. Her article is followed by an extremely interesting study by Calus, on the Right of a State to International Intercourse. It is followed by Professor Wolfke's article on Materials Used in UN Organs in International Law-making, and Frankowska's piece on the Denunciation of Treaties. A highly interesting article by Rotocki on Civil War and Merchant Shipping of Third States concludes the volume. The *Yearbook* presents varied and

interesting fare. It demonstrates a high competence in dealing with the topics discussed and great attention to presentation, form, and elegance of style.

The reviewer would like to express a hope that future volumes will include not only jurisprudential works, but also reviews of decisions of Polish courts and commercial arbitration tribunals pertaining to international law, foreign trade, legal aid, and other matters of importance to the international legal profession. Material of this type cannot be competently discussed except by Polish jurists, who are able to enlighten foreign readers as regards the real role of international law in the practice of Poland.

KAZIMIERZ GRZYBOWSKI

Netherlands Yearbook of International Law, Vol. VII, 1976. (Published under the auspices of the Interuniversity Institute for International Law, T.M.C. Asser Institute. Leiden: A. W. Sijthoff, 1976. Pp. vii, 405. Indexes.) As in prior years, this useful collection of Dutch materials on international law includes six rubrics: signed articles, an abstract of state practice, an index to treaties, a digest of judicial decisions, a bibliography of scholarly literature, and a summary of municipal legislation with international impact. The articles deal with international waterways, state succession in postwar Germany, the international status of Surinam, classification of international law rules according to their spheres of validity (a study of Kelsen's *reine Rechtslehre*), and the efforts to ban the use of certain conventional weapons.

Of interest in connection with President Carter's emphasis on human rights is the Dutch Prime Minister's refusal to make recognition of the Communist government in South Vietnam dependent upon respect for religious freedom by that government (p. 231). Another significant declaration was that "any set of rules governing international relations without an effective procedure for the settlement of disputes relating to its interpretation and application is incomplete" (p. 238).

A court at The Hague held that Euratom safety standards binding on member states conferred upon endangered individuals a direct right to judicial relief (p. 304). This problem of standing is familiar in national law.¹ In an administrative appeal by a Belgian prostitute from refusal of a residence permit, the Crown concluded that her case was not covered by the terms of a decree granting preferred treatment to nationals of member states of the European Economic Community "proceeding to the Netherlands in order to work there" (p. 311). A court in Gouda decided that eviction of a tenant for keeping a dog in violation of the terms of a lease voluntarily accepted by him did not contravene Article 8 of the European Convention on Human Rights, guaranteeing "respect for his private and family life" and his home (p. 333). The same article was construed by another court as not forbidding punishment of a soldier for refusal to comply with an order to wear his military uniform (p. 336).

EDWARD DUMBAULD

BOOKS RECEIVED *

Académie de Droit International. *Recueil des Cours, 1975. Tome III* (Vol. 146 of the collection). Leiden: A. W. Sijthoff, 1977. Pp. 452. Index.

¹ See e.g., *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).

* Mention here neither assures nor precludes later review.

- Adams, J. D. R., and J. Whalley. *The International Taxation of Multinational Enterprises in Developed Countries*. Westport: Greenwood Press, 1977. Pp. viii, 178. Index. \$19.95.
- Aliber, Robert Z. (ed.). *The Political Economy of Monetary Reform*. Montclair, N.J.: Allanheld, Osmun & Co., 1977. Pp. xiii, 270. Index. \$21.
- Amegavie, Yewou Ch. *La Banque Africaine de Développement*. Paris: Editions A. Pedone, 1977. Pp. 368.
- Barile, Giuseppe. *Lezioni di Diritto Internazionale*. Padua: CEDAM, 1977. Pp. 180. L. 6,000.
- Berber, Friedrich. *Lehrbuch des Völkerrechts Band III: Streiterledigung Kriegsverhütung Integration*. Munich: C. H. Beck'sche, 1977. Pp. xix, 358. Index. DM 48.
- Bhattacharya, Anindya K. *The Myth of Petropower*. Lexington and Toronto: Lexington Books, D. C. Heath and Co., 1977. Pp. xvii, 108. Index. \$11.95.
- Blaustein, Albert P., Jay Sigler, and Benjamin R. Reede. *Independence Documents of the World. Volumes 1 and 2*. Dobbs Ferry: Oceana Publications, Inc.; Leiden: A. W. Sijthoff, 1977. Pp.: Vol. 1, xiv, 399; Vol. 2, ix, 400-800. \$75 for the set.
- Bray, Wayne D. (compiler). *The Controversy Over a New Canal Treaty Between the United States and Panama. A Selective Annotated Bibliography of United States, Panamanian, Colombian, French, and International Organization Sources*. Washington: Library of Congress, 1976. Pp. x, 70. \$5.
- Butler, William J., John P. Humphrey, and G. E. Bisson. *The Decline of Democracy in the Philippines. A Report of Missions*. Geneva: International Commission of Jurists, 1977. Pp. viii, 97.
- Chayes, Abram, and W. Bennett Lewis (eds.). *International Arrangements for Nuclear Fuel Reprocessing*. Cambridge, Mass.: Ballinger Publishing Co., 1977. Pp. xx, 251. Index. \$15.
- Churchill, Robin, Myron Nordquist, and S. Houston Lay (eds. and compilers). *New Directions in the Law of the Sea. Volume VI: Documents and Index to Volumes I-VI*. Dobbs Ferry: Oceana Publications, Inc.; London: The British Institute of International and Comparative Law, 1977. Pp. viii, 433-975. \$30.
- Coombs, Charles. *The Arena of International Finance*. New York, London, Sydney, Toronto: John Wiley & Sons, 1976. Pp. xvii, 243. Index. \$12.95.
- Cowen, Sir Zelman. *Individual Liberty and the Law*. Calcutta: Eastern Law House; Dobbs Ferry: Oceana Publications, Inc., 1977. Pp. 203. Index. \$8.50.
- Crotti, Alfred F. *Trading under EEC and US Antitrust Laws*. London: Butterworths, 1977. Pp. xxi, 361. Index.
- de la Colina, Rafael. *El Protocolo de Reformas al Tratado Interamericano de Asistencia Reciproca Participación de Mexico*. Tlatelolco: Secretaría de Relaciones Exteriores, 1977. Pp. 239. Index.
- Dorsey, Gray. *Equality & Freedom: International and Comparative Jurisprudence. Volumes I, II, III*. Dobbs Ferry: Oceana Publications, Inc.; Leiden: A. W. Sijthoff, 1977. Pp. lxii, 1203. Index. \$75.
- Dupuy, Pierre-Marie. *La Responsabilité Internationale des Etats Pour les Dommages d'Origine Technologique et Industrielle*. Paris: Editions A. Pedone, 1977. Pp. 309.
- Dupuy, René-Jean. *Le Pétrole et la Mer*. Paris: Presses Universitaires de France, 1976. Pp. 358.
- Fahl, Gundolf. *Teil I. Die strategische Grenznachbarschaft von USA und UdSSR*. Berlin: Berlin Verlag, 1977. Pp. 111. Index. DM 18,80.
- Flachsmann, Anton. *Völkerrechtlicher Schutz gefährdeter Tiere und Pflanzen vor übermässiger Ausbeutung durch den internationalen Handel (Das Washingtoner Artenschutzabkommen von 1973)*. Zurich: Schulthess Polygraphischer Verlag, 1977. Pp. 147.
- Florio, Franco. *Spazi Marini e Principi di Diritto Internazionale*. Milan: Dott. A. Giuffrè, 1977. Pp. xv, 300. L. 7,000.
- Frank, Richard A. *Deepsea Mining and the Environment. A Report of the Working Group on Environmental Regulation of Deepsea Mining (Sponsored by the American*

- Society of International Law). St. Paul: West Publishing Co., 1977. Pp. vii, 54. \$2.25.
- Fuensalida, Patricio Novoa. *Derecho de Seguridad Social*. Santiago: Editorial Jurídica de Chile, 1977. Pp. 510.
- Galnóor, Itzhak (ed.). *Government Secrecy in Democracies*. New York, Hagerstown, San Francisco, London: Harper & Row, 1977. Pp. xviii, 317. \$5.95.
- Gandhi, D. S. *Shipowners, Mariners and the New Law of the Sea. The effects of technical, legal and political constraints upon the traditional users of the world's oceans*. London: Fairplay Publications, Ltd., 1977. Pp. vi, 83. £30, \$15.
- Gautron, Jean-Claude, and Michel Roughevin-Baville. *Droit Public du Sénégal*. Paris: Editions A. Pedone, 1977. Pp. 447.
- Gorbiel, Andrzej. *Acta Universitatis Fodziensis: Status prawny kosmosu* (Legal Status of Outer Space). Łódź: Uniwersytet Łódzki, 1977. Pp. 174.
- Hermann, A. H., and Colin Jones. *Fair Trading in Europe*. London: Kluwer-Harrap Handbooks, 1977. South Hackensack: Fred B. Rothman & Co., U.S. distributors. Pp. xxviii, 443. Index.
- Hoffmann, Dietrich. *The German Co-Determination Act 1976*. Deventer: Kluwer; Frankfurt am Main: Alfred Metzner, 1976. Pp. 96. Index.
- Kaiser, Karl, and Karl Markus Kreis (eds.). *Sicherheitspolitik vor neuen Aufgaben*. Frankfurt am Main: Alfred Metzner Verlag, 1977. Pp. xv, 445. Index.
- Kirgis, Frederic L., Jr. *International Organizations in their Legal Setting. Documents, Comments and Questions*. St. Paul: West Publishing Co., 1977. Pp. xiv, 1016. Index. \$18.95.
- Jacobs, Jan. *Die Europäische Wirtschaftsgemeinschaft und die Sowjetische Völkerrechtsdoktrin*. Karlsruhe: Verlag Rüegger, 1977. Pp. 110. Fr/DM. 24.
- Juviler, Peter H. *Revolutionary Law and Order. Politics and Social Change in the USSR*. New York: The Free Press; London: Collier Macmillan Publishers, 1976. Pp. xii, 274. Index. \$13.95.
- Knight, H. Gary. *Managing the Sea's Living Resources. Legal and Political Aspects of High Seas Fisheries*. Lexington and Toronto: Lexington Books, D. C. Heath and Co., 1977. Pp. xiii, 140. Index. \$16.
- Kolvenback, Walter. *Workers Participation in Europe*. Deventer: Kluwer; Frankfurt am Main: Alfred Metzner, 1977. Pp. 79. Dfl.34,50.
- Krökel, Michael. *Die Bindungswirkung von Resolutionen des Sicherheitsrates der Vereinten Nationen gegenüber Mitgliedstaaten*. Berlin: Duncker & Humblot, 1977. Pp. 187. DM 54,80.
- Kugel, Yerachmiel, and Gladys W. Gruenberg. *International Payoffs, Dilemma for Business*. Lexington and Toronto: Lexington Books, D. C. Heath and Co., 1977. Pp. xiii, 209. Index. \$15.
- Li, Victor H. *De-Recognizing Taiwan: The Legal Problems*. Washington and New York: Carnegie Endowment for International Peace, 1977. Pp. 48. \$1.50, paperback.
- Law and Politics in China's Foreign Trade*. Seattle and London: University of Washington Press, 1977. Pp. xx, 467. Index. \$20.
- Lombardi, Aldo Virgilio. *Bürgerkrieg und Völkerrecht. Die Anwendbarkeit völkerrechtlicher Normen in nicht-zwischenstaatlichen bewaffneten Konflikten*. Berlin: Duncker & Humblot, 1976. Pp. 416. Index. DM 96.
- Mansilla, Hugo Llanos. *Teoría y Práctica del Derecho Internacional Público. De las Fuentes y de las Relaciones con el Derecho Interno*. Santiago: Editorial Jurídica de Chile. Pp. xvi, 536.
- Matte, Nicolas Mateesco (ed.). *Annals of Air and Space Law, Vol. 1, 1976*. Toronto: The Carswell Co., Ltd.; Paris: Editions A. Pedone, 1977. Pp. viii, 289.
- Medina, Manuel. *Tratados fundacionales de las comunidades europeas, Vol. I*. Madrid: Consejo Superior de Investigaciones Científicas, Instituto Francisco de Vitoria, 1976. Pp. xxv, 545. Index.

- Meijers, H., and E. W. Vierdag (eds.). *Essays on International Law and Relations in Honour of A.J.P. Tammes*. Leiden: A. W. Sijthoff, 1977. Pp. viii, 371. Dfl.65; \$26.
- Miliband, Ralph. *Marxism and Politics*. New York: Oxford University Press, 1977. Pp. viii, 199. Index. \$10, cloth, \$2.95, paper.
- Netherlands Ministry of Justice. *The Netherlands Civil Code. Book 6, The Law of Obligations. Draft Text and Commentary*. Leiden: A. W. Sijthoff, 1977. Pp. viii, 654. Dfl.120; \$48.
- Neuhold, Hanspeter. *Internationale Konflikte—verbotene und erlaubte Mittel ihrer Austragung*. Vienna and New York: Springer-Verlag, 1977. Pp. xx, 598. Index. DM 123; \$54.20.
- Oda, Shigeru. *The Law of the Sea in our Time. Vol. I: New Developments, 1966–1975. Vol. II: The United Nations Seabed Committee 1968–1973*. Leiden: A. W. Sijthoff, 1977. Vol. I, pp. xiii, 269. Index. Dfl.56; \$22.50. Vol. II, pp. xvi, 332. Indexes. Dfl.64; \$25.50.
- Oettinger, Anthony G., Paul J. Berman, and William H. Read. *High and Low Politics: Information Resources for the 80s*. Cambridge, Mass.: Ballinger Publishing Co., 1977. Pp. xvii, 260. Index.
- Papadakis, Nikos. *The International Legal Regime of Artificial Islands*. Leiden: A. W. Sijthoff, 1977. Pp. xxi, 277. Indexes. Dfl.58; \$23.25.
- Paust, Jordan J., and Albert P. Blaustein with Adele Higgins. *The Arab Oil Weapon*. Dobbs Ferry: Oceana Publications, Inc.; Leiden: A. W. Sijthoff, 1977. Pp. vii, 370. \$27.50.
- Pittsburgh University. *Strategic Studies Reference Guide, Vol. One, 1975*. Pittsburgh: University Center for International Studies, 1977. Pp. 232.
- Plischke, Elmer. *Microstates in World Affairs. Policy Problems and Options*. Washington: American Enterprise Institute for Public Policy Research, 1977. Pp. xii, 153. \$3.
- Rigaux, François. *Droit Public et Droit Privé dans les Relations Internationales*. Paris: Editions A. Pedone, 1977. Pp. v, 486. Index. F.100.
- Rijksuniversiteit te Leiden. *Praesidium Libertatis*. Opstellen over het thema vrijheid en recht, uitgegeven ter gelegenheid van het 400-jarig bestaan der Rijksuniversiteit te Leiden. Deventer: Kluwer, 1975. Pp. vii, 348. Dfl.57,25.
- Ringeard, Gisèle. *Les Astronomes et le Droit de l'Espace*. Paris: Presses Universitaire de France, 1977. Pp. iii, 250.
- Rozakis, Christos L. *The Law of the Sea as Developed through the Claims of the Coastal States* (in Greek). Athens: Papazisis Publishing Co., 1976. Pp. 372. Bibliography and maps.
- Sawicki, Stanislaw J. *Soviet Land and Housing Law. A Historical and Comparative Study*. New York and London: Praeger Publishers, 1977. Pp. xxiii, 199. Index.
- Schermers, Henry G. *Judicial Protection in the European Communities*. Deventer: Kluwer, 1976. South Hackensack: Fred B. Rothman & Co., U.S. distributors. Pp. xviii, 406. Indexes. \$22.75.
- Schlagheck, James L. *The Political, Economic, and Labor Climate in Brazil*. Philadelphia: University of Pennsylvania, The Wharton School, 1977. Pp. xi, 116. Index. \$7.50.
- Scovazzi, Tullio. *Gli Accordi Bilaterali Sulla Pesca*. Milan: Dott. A. Giuffrè, 1977. Pp. 118. Index.
- Sebek, Victor. *The Eastern European States & the Development of the Law of the Sea, Vol. I*. (volume 2 projected) Dobbs Ferry: Oceana Publications, Inc., 1977. Loose-leaf service with supplementation planned. \$60/binder.
- Solomon, Robert. *The International Monetary System 1945–1976. An Insider's View*. New York, Hagerstown, San Francisco, and London: Harper & Row, 1977. Pp. xv, 381. Index. \$17.50.
- Spinnler, Peter. *Das Kriegsgefangenen Recht im Koreakonflikt*. Karlsruhe: Verlag Rüegger, 1976. Pp. xxv, 323. Fr.39.

- Stalder, Christoph. *"Preferred Freedoms" das Verhältnis der Meinungsäusserungsfreiheit zu den anderen Grundrechten.* Bern: Verlag Stämpfli & Cie AG, 1977. Pp. 162.
- Strozzi, Girolamo. *Interessi Statali e Interessi Privati nell'Ordinamento Internazionale. La Funzione del Previo Esaurimento dei Ricorsi Interni.* Milan: Dott. A. Giuffrè Editore, 1977. Pp. 422. Index. L.10,000.
- Tan, Su-cheng. *The Expansion of Soviet Seapower and the Security of Asia.* Taipei: Asia & the World Forum, 1977. Pp. vii, 177. US\$1.50; NTS\$40.
- Ullrich, Hanns. *Standards of Patentability for European Inventions. Vol. I: Should an Inventive Step Advance the Art?* Weinheim and New York: Verlag Chemie, 1977. Pp. xxi, 116. Index. \$25.80.
- U.S. Department of State. *Foreign Relations of the United States 1949, Volume I: National Security Affairs; Foreign Economic Policy.* (Dept. of State Pub. 8850). Pp. xxv, 836. Index. \$11. *Volume VII: The Far East and Australasia (in two parts). Part 2.* (Dept. of State Pub. 8857). Pp. x, 601-1220. Index. \$9.30. Washington: U.S. Govt. Printing Office, 1977.
- Foreign Relations of the United States 1950, Volume I: National Security Affairs; Foreign Economic Policy.* (Dept. of State Pub. 8887). Washington: U.S. Govt. Printing Office, 1977. Pp. xi, 945. Index. \$11.
- Verwey, Wil D. *Riot Control Agents and Herbicides in War.* Leiden: A. W. Sijthoff, 1977. Pp. xviii, 377. Index. Dfl.135; \$54.
- Veuthey, Michel. *Guérilla et Droit Humanitaire.* Geneva: Collection scientifique de l'Institut Henry-Dunant, 1976. Pp. xvi. 430. Index.
- Watt, D. C. *Survey of International Affairs 1963.* Oxford; London, New York: Oxford University Press, 1977, for the Royal Institute of International Affairs. Pp. xi, 351. Index. \$55.

OFFICIAL DOCUMENTS

UNITED STATES: EXPORT ADMINISTRATION AMENDMENTS OF 1977 *

PUBLIC LAW 95-52

95th CONGRESS

June 22, 1977

An Act

To amend the Export Administration Act of 1969 in order to extend the authorities of that Act and improve the administration of export controls under that Act, and to strengthen the antiboycott provisions of that Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Export Administration Amendments of 1977."

.....

TITLE II—FOREIGN BOYCOTTS

PROHIBITION ON COMPLIANCE WITH FOREIGN BOYCOTTS

SEC. 201. (a) The Export Administration Act of 1969 is amended by redesignating section 4A as section 4B and by inserting after section 4 the following new section:

"FOREIGN BOYCOTTS

"SEC. 4A. (a)(1) For the purpose of implementing the policies set forth in section 3(5) (A) and (B), the President shall issue rules and regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:

"(A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country. The mere absence of a business relationship with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, does not indicate the existence of the intent

* Title I—Export Administration Improvements and Extension is not reproduced here. The full text of the Act can be found in 16 ILM 909 (1977).

required to establish a violation of rules and regulations issued to carry out this subparagraph.

"(B) Refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.

"(C) Furnishing information with respect to the race, religion, sex, or national origin of any United States person or of any owner, officer, director, or employee of such person.

"(D) Furnishing information about whether any person has, has had, or proposes to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country. Nothing in this paragraph shall prohibit the furnishing of normal business information in a commercial context as defined by the Secretary of Commerce.

"(E) Furnishing information about whether any person is a member of, has made contributions to, or is otherwise associated with or involved in the activities of any charitable or fraternal organization which supports the boycotted country.

"(F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by rules and regulations issued pursuant to this paragraph, and no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.

"(2) Rules and regulations issued pursuant to paragraph (1) shall provide exceptions for—

"(A) complying or agreeing to comply with requirements (i) prohibiting the import of goods or services from the boycotted country or goods produced or services provided by any business concern organized under the laws of the boycotted country or by nationals or residents of the boycotted country, or (ii) prohibiting the shipment of goods to the boycotting country on a carrier of the boycotted country, or by a route other than that prescribed by the boycotting country or the recipient of the shipment;

"(B) complying or agreeing to comply with import and shipping document requirements with respect to the country of origin, the name of the carrier and route of shipment, the name of the supplier of the shipment or the name of the provider of other services, except that no information knowingly furnished or conveyed in response to such requirements may be stated in negative, blacklisting, or similar exclusionary terms after the expiration of 1 year following the date of enactment of the Export Administration Amendments of 1977 other than with respect to carriers or route of shipment as may be permitted by such rules and regulations in order to comply with precautionary requirements protecting against war risks and confiscation;

"(C) complying or agreeing to comply in the normal course of business with the unilateral and specific selection by a boycotting country, or national resident thereof, of carriers, insurers, suppliers of services to be performed within the boycotting country or specific goods which, in the

normal course of business, are identifiable by source when imported into the boycotting country;

“(D) complying or agreeing to comply with export requirement of the boycotting country relating to shipments or transshipments of exports to the boycotted country, to any business concern of or organized under the laws of the boycotted country, or to any national or resident of the boycotted country;

“(E) compliance by an individual or agreement by an individual to comply with the immigration or passport requirements of any country with respect to such individual or any member of such individual's family or with requests for information regarding requirements of employment of such individual within the boycotting country; and

“(F) compliance by a United States person resident in a foreign country or agreement by such person to comply with the laws of that country with respect to his activities exclusively therein, and such rules and regulations may contain exceptions for such resident complying with the laws or regulations of that foreign country governing imports into such country of trademarked, trade-named, or similarly specifically identifiable products or components of products for his own use, including the performance of contractual services within that country, as may be defined by such rules and regulations.

“(3) Rules and regulations issued pursuant to paragraphs (2)(C) and (2)(F) shall not provide exceptions from paragraphs (1)(B) and (1)(C).

“(4) Nothing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States.

“(5) Rules and regulations pursuant to this subsection shall be issued not later than 90 days after the date of enactment of this section and shall be issued in final form and become effective not later than 120 days after they are first issued, except that (A) rules and regulations prohibiting negative certification may take effect not later than 1 year after the date of enactment of this section, and (B) a grace period shall be provided for the application of the rules and regulations issued pursuant to this subsection to actions taken pursuant to a written contract or other agreement entered into on or before May 16, 1977. Such grace period shall end on December 31, 1978, except that the Secretary of Commerce may extend the grace period for not to exceed 1 additional year in any case in which the Secretary finds that good faith efforts are being made to renegotiate the contract or agreement in order to eliminate the provisions which are inconsistent with the rules and regulations issued pursuant to paragraph (1).

“(6) This Act shall apply to any transaction or activity undertaken, by or through a United States or other person, with intent to evade the provisions of this Act as implemented by the rules and regulations issued pursuant to this subsection, and such rules and regulations shall expressly provide that the exceptions set forth in paragraph (2) shall not permit activities or agreements (expressed or implied by a course of conduct, including a pattern of responses) otherwise prohibited, which are not within the intent of such exceptions.

“(b)(1) In addition to the rules and regulations issued pursuant to subsection (a) of this section, rules and regulations issued under section 4(b) of this Act shall implement the policies set forth in section 3(5).

“(2) Such rules and regulations shall require that any United States person receiving a request for the furnishing of information, the entering into or implementing of agreements, or the taking of any other action referred to in section 3(5) shall report that fact to the Secretary of Commerce, to-

gether with such other information concerning such request as the Secretary may require for such action as he may deem appropriate for carrying out the policies of that section. Such person shall also report to the Secretary of Commerce whether he intends to comply and whether he has complied with such request. Any report filed pursuant to this paragraph after the date of enactment of this section shall be made available promptly for public inspection and copying, except that information regarding the quantity, description, and value of any articles, materials, and supplies, including technical data and other information, to which such report relates may be kept confidential if the Secretary determines that disclosure thereof would place the United States person involved at a competitive disadvantage. The Secretary of Commerce shall periodically transmit summaries of the information contained in such reports to the Secretary of State for such action as the Secretary of State, in consultation with the Secretary of Commerce, may deem appropriate for carrying out the policies set forth in section 3(5) of this Act."

(b) Section 4(b)(1) of such Act is amended by striking out the next to the last sentence.

(c) Section 7(c) of such Act is amended by striking out "No" and inserting in lieu thereof "Except as otherwise provided by the third sentence of section 4A(b)(2) and by section 6(c)(2)(C) of this Act, no."

STATEMENT OF POLICY

SEC. 202. (a) Section 3(5)(A) of the Export Administration Act of 1969 is amended by inserting immediately after "United States" the following: "or against any United States person."

(b) Section 3(5)(B) of such Act is amended to read as follows: "(B) to encourage and, in specified cases, to require United States persons engaged in the export of articles, materials, supplies, or information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or against any United States person,".

ENFORCEMENT

SEC. 203. (a) Section 6(c) of the Export Administration Act of 1969 is amended—

(A) by redesignating such section as section 6(c)(1); and

(B) by adding at the end thereof the following new paragraph:

"(2)(A) The authority of this Act to suspend or revoke the authority of any United States person to export articles, materials, supplies, or technical data or other information, from the United States, its territories or possessions, may be used with respect to any violation of the rules and regulations issued pursuant to section 4A(a) of this Act.

"(B) Any administrative sanction (including any civil penalty or any suspension or revocation of authority to export) imposed under this Act for a violation of the rules and regulations issued pursuant to section 4A(a) of this Act may be imposed only after notice and opportunity for an agency hearing on the record in accordance with sections 554 through 557 of title 5, United States Code.

"(C) Any charging letter or other document initiating administrative proceeding for the imposition of sanctions for violations of the rules and regulations issued pursuant to section 4A(a) of this Act shall be made available for public inspection and copying."

(b) Section 8 of such Act is amended by striking out "The" and inserting in lieu thereof "Except as provided in section 6(c)(2), the".

DEFINITIONS

SEC. 204. Section 11 of the Export Administration Act of 1969 is amended to read as follows:

"DEFINITIONS

"SEC. 11. As used in this Act—

"(1) the term 'person' includes the singular and the plural and any individual, partnership, corporation, or other form of association, including any government or agency thereof; and

"(2) the term 'United States person' means any United States resident or national (other than an individual resident outside the United States and employed by other than a United States person), any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as determined under regulations of the President."

PREEMPTION

SEC. 205. The amendments made by this title and the rules and regulations issued pursuant thereto shall preempt any law, rule, or regulation of any of the several States or the District of Columbia, and any of the territories or possessions of the United States, or of any governmental subdivision thereof, which law, rule, or regulation pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries.

Approved June 22, 1977.

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[The following abbreviations refer to sections of the *Journal*: *BN*, Book Note; *BR*, Book Review; *Corr.*, Correspondence; *CP*, Contemporary Practice of the US Relating to International Law; *Ed.*, Editorial Comment; *JD*, Judicial Decisions; *LA*, leading article; *NC*, Notes and Comments; *OD*, Official Documents. Other abbreviations include: ECHR, European Commission of Human Rights; ICJ, International Court of Justice; PCIJ, Permanent Court of International Justice; OAS, Organization of American States; OECD, Organisation for Economic Co-operation and Development; OPEC, Organization of Petroleum Exporting Countries; UK, United Kingdom; UNCLOS, United Nations Conference on the Law of the Sea; UNEP, United Nations Environmental Programme; UNGA, United Nations General Assembly; UNSC, United Nations Security Council.]

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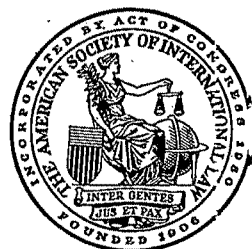
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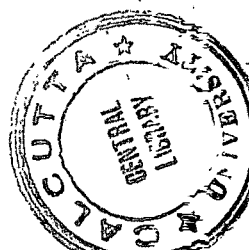
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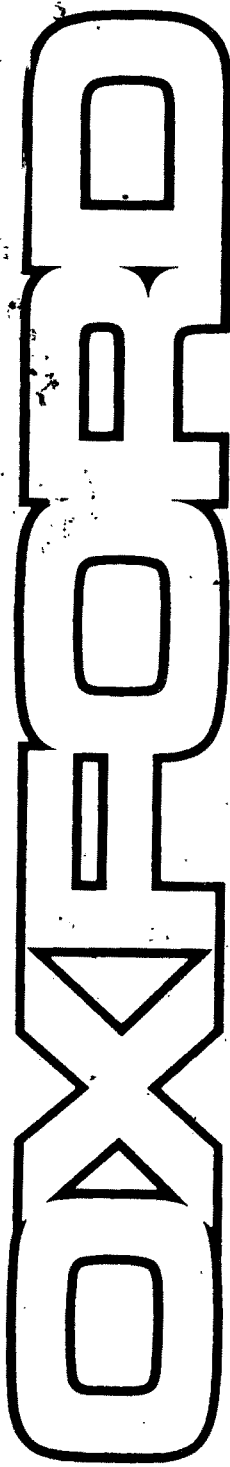
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